FEDERAL BUREAU OF INVESTIGATION
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Page 69 ~ Referral/Consult;
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Page 110 ~ Referral/Direct - 147A-OM-571 Serial 648/EOUSA;
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Page 258 ~ b3; b6; b7C;
Page 259 ~ b3; b6; b7C;
Page 260 ~ b3; b6; b7C;
Page 261 ~ b3; b6; b7C;

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FD-302 (REV. 3-10-82)

FEDERAL BUREAU OF INVESTIGATION

- 1 -

Date of transcription 11/22/89

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[redacted] PRESBYTERY OF MISSOURI RIVER VALLEY, 4412 Farnam Street, Omaha, Nebraska, telephone 553-8300, was interviewed by Special Agent (SA) [redacted] of the Federal Bureau of Investigation (FBI) and SA [redacted] of the Internal Revenue Service (IRS). [redacted] provided the following information:

[redacted] advised in August or September, 1989, she noticed the carpet in the basement of the conference room being cut out in about a two foot square. Underneath the carpet was an area which was originally designed for a safe within the Presbytery. Through observation of this area, it was determined this was approximately a one foot cube lined with three-quarter inch plywood which has rotted out. This was topped by 2 X 6 and 2 X 4 boards with the carpet laid over the top of the boards. [redacted] advised historically this has been a low depression area within the floor, however, she was unaware what caused this low depression. No record at the Presbytery has been maintained regarding the contents or if anything was stored in this concealed area.

[redacted] advised that at approximately the same time she observed the carpet being cut out, she and [redacted] Secretary, had become aware of [redacted] son of [redacted] staying late at the Presbytery. [redacted] was frequenting the Presbytery as a committee chairman for the Christian Social Responsibilities which met on a monthly basis, and also for a council meeting which meets monthly. [redacted] would frequent the Presbytery on a very frequent basis, utilizing the copier, and making several hundred copies of letters. [redacted] for three churches in western Iowa. They are unaware of why he would need 300 to 400 copies of letters [redacted] advised several times the Presbytery was closed, leaving [redacted] within the building without being supervised. She is unaware if [redacted] cut the carpet or how the carpet was cut originally. [redacted] does not know if contained within the one cubed foot area there was something of value, since no record was maintained at the Presbytery regarding this area. [redacted] advised she has questioned

Investigation on 11/21/89 at Omaha, Nebraska File # OM 147A-571-626

by SA [redacted] Date dictated 11/22/89

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[redacted]

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the janitor, [redacted] and various other employees regarding the carpet, and no one is aware how the carpet was cut, and if contents were maintained or stored within this area, and what the purpose for cutting the carpet was originally.

[redacted] advised upon noticing the carpet, she immediately contacted [redacted] of the National Credit Union Association (NCUA).

[redacted] advised if she became aware of more information regarding this area and the contents of it, she would immediately contact the FBI.

FD-302 (REV. 3-10-82)

FEDERAL BUREAU OF INVESTIGATION

- 1 -

Date of transcription 11/22/89

[redacted] Omaha, Nebraska, telephone [redacted] was telephonically contacted by Special Agent (SA) [redacted] of the Federal Bureau of Investigation (FBI). [redacted] provided the following information: b6 b7C

[redacted] advised that in August or September, 1989, upon cleaning the PRESBYTERY OF MISSOURI RIVER VALLEY, she observed the carpet being cut out in the conference room located in the basement of the Presbytery. The carpet was cut out in approximately a two foot square. Beneath this carpet area is about a one foot cubic area lined with three-quarter inch plywood which has rotted out. [redacted] observed nothing within the one cubic foot area. [redacted] advised early in 1989, the Presbytery had new air conditioning units placed and installed within the Presbytery. Prior to the installation of new air conditioning units, a plumber was replumbing the Presbytery. [redacted] advised she thought at first some construction project or plumbing pipes were located within the area which was exposed. [redacted] advised at the same time the Presbytery was experiencing a mice problem, she was of the opinion the mice were coming into the Presbytery through this area.

[redacted] advised she could not provide any information regarding the contents of the one foot cubic area or of any individual which may have cut the carpet.

[redacted] cleans the Presbytery on Wednesday and weekends and works approximately 10 hours a week.

[redacted] advised she would immediately contact the FBI if she became aware of any additional information regarding this matter.

Investigation on 11/21/89 at Omaha, Nebraska File # OM 147A-571-627

by SA [redacted] Date dictated

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[redacted]

FD-302 (REV. 3-10-82)

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 11/22/89

[redacted], Omaha, Nebraska, telephone number [redacted] Secretary for PRESBYTERY OF MISSOURI VALLEY, Omaha, Nebraska, was interviewed by Special Agent (SA) [redacted] of the Federal Bureau of Investigation (FBI) and SA [redacted] of the Internal Revenue Service (IRS). [redacted] provided the following information: b6 b7C

[redacted] advised in August or September, 1989, she learned from [redacted] of the carpet being cut out in the conference room in the basement of the Presbytery. At approximately this same time, she was aware of [redacted] staying late on several occasions using the excuse of various meetings he was a member of or they were meeting at the Presbytery. [redacted] advised specifically she could recall certain times in either August or September, 1989, of [redacted] staying after 5:00 p.m., and had a meeting regarding the Christian Social Responsibilities for the Homeless and then was meeting with a Methodist minister and another pastor from the Presbytery, [redacted], of the FAIRVIEW PRESBYTERY, telephone 451-8125 or 330-4533.

[redacted] advised she is unaware of the contents of the one cubic foot area which has become exposed when the carpet was cut away. She does not know if [redacted] would have cut the carpet.

[redacted] advised if she were to learn any additional information regarding this matter, she would immediately contact the FBI.

Investigation on 11/21/89 at Omaha, Nebraska File # OM 147A-571-628

by SA [redacted] Date dictated 11/22/89

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SEARCHED INDEXED SERIALIZED FILED [illegible] 1989 FBI [redacted]

FD-302 (REV. 3-10-82)

FEDERAL BUREAU OF INVESTIGATION

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Date of transcription 11/20/89

[redacted] Registered Representative, ~~BOKELMAN~~ INVESTMENTS, 108 East Cedar Dale Road, Papillion, Nebraska, 592-1355, was interviewed by Special Agent (SA) [redacted] of the Federal Bureau of Investigation (FBI) and SA [redacted] of the Internal Revenue Service (IRS). [redacted] provided the following information:

[redacted] advised in approximately December of 1988, she was telephonically contacted by a [redacted] was referred to her office by [redacted] of BROKERAGE SERVICES. [redacted] is a wholesale broker who does not deal with the general public in the sale of securities. [redacted] was wanting information on how to invest an inheritance of $400,000.00 with the potential of receiving an additional $2 million. [redacted] attempted to set up an appointment for personal appearance of [redacted] which was set for December 28, 1988. [redacted] advised she was unable to make the appointment since a friend was coming in to review the investments from Chicago, Illinois, and would handle the potential investment.

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[redacted] advised [redacted] provided a physical description of a black female, a working single parent, and was employed at CAFE CARNAVALE, then owned by [redacted] of FRANKLIN COMMUNITY FEDERAL CREDIT UNION. [redacted] was married to a [redacted] who resided in the North Omaha area, and could be contacted at a telephone number which [redacted] no longer has in her possession.

[redacted] would not provide any investment information over the telephone until a personal contact could be made with [redacted] As a result, no further discussions on how to invest the money were made. [redacted] had indicated she was interested in buying real estate to house her various relatives in the Omaha area. [redacted] could not provide any further information regarding [redacted] and has not been recontacted by [redacted] since December of 1988.

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Investigation on 11/17/89 at Papillion, Nebraska File # Omaha 194A-5711

by SA [redacted] Date dictated 11/20/89

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FD-302 (REV. 3-10-82)

FEDERAL BUREAU OF INVESTIGATION

- 1 -

Date of transcription 11/21/89

[redacted] FIRST AFFILIATED SECURITIES, INC., 226 Blackstone Center, 302 South 36th Street, Omaha, Nebraska, telephone 346-0490, was interviewed by Special Agent (SA) [redacted] of the Federal Bureau of Investigation (FBI) and SA [redacted] of the Internal Revenue Service (IRS). [redacted] provided the following information:

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[redacted] advised in approximately November or December of 1988, she was telephonically contacted by a female who identified herself as [redacted] Through conversation, [redacted] was able to provide a description of [redacted] as a black female, approximately [redacted] years old, who is a single parent of three children, living in the north side of Omaha, Nebraska. [redacted] was to have been married to a [redacted] in the North Omaha area. No further description was available. [redacted] never met [redacted] and could not provide any other identifying information.

[redacted] advised [redacted] had contacted her on the advice of [redacted] of BROKERAGE SERVICES. [redacted] is a wholesale broker who was contacted by [redacted] regarding the investment of approximately $2 million. [redacted] referred [redacted] to [redacted] who was contacted by telephone. [redacted] indicated she was in the process of receiving $2 million which consisted of an inheritance and loan. She was seeking information on investment opportunities and wanted [redacted] advice on how to invest the $2 million. [redacted] advised she receives numerous telephone calls from various unknown individuals in the Omaha area regarding non-existent fortunes and how people should invest their money if they were to receive a large sum of money. [redacted] attempts to have serious potential investors come into her office to obtain information regarding investments. [redacted] advised [redacted] wanted to invest the money and purchase an apartment building to house her various relatives and to provide a residence to those relatives with the money.

[redacted] advised later in the conversations of which she had two telephone conversations, she learned [redacted] could be contacted through CAFE CARNAVALE, which was owned by [redacted] advised she had several relatives which were employed at CAFE CARNAVALE through [redacted] advised she attempted

Investigation on 11/17/89 at Omaha, Nebraska File # Omaha 147A-1571-e30

by SA [redacted] Date dictated 11/20/89

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to contact [redacted] at CAFE CARNAVALE. She left a message for [redacted] and [redacted] recontacted her following the message left at CAFE CARNAVALE.

[redacted] advised after the second conversation, she received no further contact from [redacted] and could not provide any further details regarding the money or investment.

[redacted] advised FIRST AFFILIATED SECURITIES has no other business dealings with FRANKLIN COMMUNITY FEDERAL CREDIT UNION or the principals of FRANKLIN COMMUNITY FEDERAL CREDIT UNION.

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FEDERAL BUREAU OF INVESTIGATION

Date of transcription 11/22/89

[redacted] BROKERAGE SERVICES, Omaha, Nebraska, telephone number 334-5210, was telephonically interviewed by Special Agent (SA) [redacted] of the Federal Bureau of Investigation (FBI). [redacted] provided the falling information: b6 b7C

[redacted] advised BROKERAGE SERVICES is a wholesale stock representative for mutual funds and various insurance companies, specifically representing the PIONEER GROUP out of Boston, Massachusetts, and a brokerage service for various brokerage companies in the Omaha, Nebraska area. [redacted] advised BROKERAGE SERVICES is listed in the yellow pages of the telephone directory.

[redacted] advised that as a result of this listing, he believes a [redacted] contacted him regarding a potential investment of two million dollars and was seeking advise on how to invest this money. [redacted] advised that after a brief conversation, he determined [redacted] was in need of a financial planner, and as a result he referred [redacted] to [redacted] and [redacted] of FIRST FINANCIAL AFFILIATES.

[redacted] advised he did not obtain any identifying information from [redacted] regarding her present address or telephone number. After her needs were determined, he simply referred her to both of the above individuals for assistance.

[redacted] advised he had forgotten the incident until subpoenas were served on [redacted] and [redacted] for records regarding FRANKLIN COMMUNITY FEDERAL CREDIT UNION (FCFCU). [redacted] advised either through conversations with [redacted] or [redacted] he is of the opinion [redacted] was a relative of [redacted] could not recall why he is of that opinion, other than through those conversations he had with [redacted] or because of a newspaper article he may have read regarding [redacted] and her relation with [redacted]

[redacted] advised if he could recall anymore specific information regarding [redacted] he would immediately contact the FBI.

Investigation on 11/21/89 at Omaha, Nebraska File # OM 147A-571 ~~1631~~

by SA [redacted] Date dictated 11/22/89

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NOV [redacted]

NATIONAL CREDIT UNION ADMINISTRATION

WASHINGTON, D.C. 20456

[redacted]

FACSIMILE TRANSMITTAL

COVER SHEET

DATE: 11/17/89 TIME: 9:55 A.M. ; P.M.

TO: [redacted] b6 b7C

AT FAX NO. 402/221-4757

OF PAGES: (Excluding Cover Page) 8

SUBJECT: Franklin FCU

FROM: [redacted]

NATIONAL CREDIT UNION ADMINISTRATION

OFFICE: OGC

FOR VERIFICATION CALL: (202) 682- 9620 1474-571-632

OPERATOR: [redacted]

[redacted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

NATIONAL CREDIT UNION ADMINISTRATION BOARD, as Liquidating Agent for FRANKLIN COMMUNITY FEDERAL CREDIT UNION,

Plaintiff,

vs.

CHARLES JOHN-BAPTISTE, FLOYD WATERMAN, JEANNE RODGERS, CARNELL DEASEN, HELEN PATTERSON, ROBERT JONES, STAN KESSLER, GLENN E. MITCHEL, SR., NANCY CALLINGER, JAMES C. HART, JR., ARTHUR MILLER, MYRTLE BROWDER, JARRETT WEBB, JUNE SWANIGAN, MARIE BASTIAN, and WALTER CALLINGER,

Defendants.

CIV. NO. _____

COMPLAINT

National Credit Union Administration Board, as liquidating agent for Franklin Community Federal Credit Union, for its cause of action against the defendant alleges and states as follows:

FIRST CLAIM -- BOARD OF DIRECTORS

1. National Credit Union Administration Board (NCUAB) is an agency of the United States government organized and existing pursuant to the Federal Credit Union Act, 12 U.S.C. § 1751, et seq.

2. This Court has jurisdiction over the subject matter of this action pursuant to 12 U.S.C. § 1789(2)(2), 28 U.S.C. § 1331 and 1345.

3. Venue is proper hereunder pursuant to 28 U.S.C. § 1391.

4. The Franklin Community Federal Credit Union (FCFCU) is a federal credit union organized pursuant to the Federal Credit Union Act, 12 U.S.C. § 1751, et seq., with its principal place of business in Omaha, Nebraska. It was chartered by the National Credit Union Administration on December 13, 1969 and has been insured by the National Credit Union Share Insurance Fund since April 23, 1973.

5. On the 10th day of November, 1988, acting pursuant to the Federal Credit Union Act, the National Credit Union Administration Board found the FCFCU to be insolvent and appointed itself as the liquidating agent for Franklin Community Federal Credit Union. A copy of that Order is attached as Exhibit "D". This suit is brought by the NCUAB in its capacity as liquidating agent for FCFCU.

6. Lawrence E. King, Jr. is a resident of Omaha, Douglas County, Nebraska and from 1970 until November 10, 1988 Lawrence E. King, Jr. was the Treasurer and Manager of the Franklin Community Federal Credit Union.

7. A. Charles John-Baptiste is a resident of _____, Prior to _____, he was a resident of Omaha, Nebraska, and was a member of the Board of Directors of FCFCU for a number of years prior to its liquidation, and was Chairman of the Board of Directors from October 1985 until its liquidation.

B. Defendant, Dr. Floyd Waterman is a resident of Omaha, Nebraska, and was a member of the Board of Directors for a number of years prior to its liquidation.

C. Defendant, Jeanne Rodgers is a resident of Omaha, Nebraska, and was a member of the Board of Directors from October 1985 until its liquidation.

D. Defendant, Carnell Deasen is a resident of Omaha, Nebraska, and was a member of the Board of Directors from October 1985 until its liquidation.

E. Defendant, Helen Patterson is a resident of Omaha, Nebraska, and was a member of the Board of Directors from October 1985 until its liquidation.

F. Defendant, Robert Jones is a resident of Omaha, Nebraska, and was a member of the Board of Directors from April 1983 until its liquidation.

G. Defendant, Stan Kessler is a resident of Omaha, Nebraska, and was a member of the Board of Directors from April 1983 until its liquidation.

H. Defendant, Glenn E. Mitchel, Sr. is a resident of Omaha, Nebraska, and was a member of the Board of Directors from January 1988 until its liquidation.

I. Defendant, Nancy Callinger is a resident of Omaha, Nebraska, and was a member of the Board of Directors from June 1988 until its liquidation.

J. Defendant, James C. Hart, Jr. is a resident of Omaha, Nebraska, and was a member and Secretary of the Board of Directors from October 1985 until its liquidation.

8. A. Mr. Arthur Miller is a resident of Omaha, Nebraska, and was a member and Chairman of the Board of Directors of FCFCU for a number of years prior to October 1985.

B. Myrtle Browder is a resident of Omaha, Douglas County, Nebraska, and was a member of the Board of Directors of FCFCU for a number of years prior to October, 1985.

C. Jarrett Webb is a resident of Omaha, Douglas County, Nebraska, and was a member of the Board of Directors of FCFCU for a number of years prior to December 1987.

D. June Swanigan is a resident of Omaha, Douglas County, Nebraska, and was a member of the Board of Directors of FCFCU for a number of years prior to December 1987.

E. Marie Bastian is a resident of Omaha, Douglas County, Nebraska, and was a member of the Board of Directors of FCFCU from April 1983 until about August 1986.

F. Walter Callinger is a resident of Omaha, Douglas County, Nebraska, and was a member of the Board of Directors of FCFCU from January 1988 until June 1988.

9. Under the direction, control and supervision of Lawrence E. King, Jr. and the Board of Directors the FCFCU followed a practice of advertising and selling millions of dollars of purported certificates of deposit at above market rates. Neither the existence of these outstanding certificates of deposit, nor the proceeds of the certificates were disclosed by management within the books and records of the company or disclosed on its financial statements. At the time of the closing $33,283,053.00 in purported certificates were outstanding but not recorded, while the books and financial statement of the credit union on September 30, 1988 reflected assets of $2,516,532.70, recorded liabilities of $40,770.56 and recorded shares of $2,036,929.79. Actual assets at the date of closing totalled $3,163,213 while total deposits were $42,247,667 with a deficit of $39,084,454.

10. In the exercise of control the FCFCU and in violation of his fiduciary duties defendant King committed a long series of fraudulent, dishonest and illegal acts by which funds were transferred from FCFCU to himself, to other entities and persons for his benefit and to other entities and persons intended to be benefited by him, all to the damage and detriment of FCFCU and in violation of the fiduciary duty of Lawrence E. King, Jr. to FCFCU.

11. Among the fraudulent, dishonest and illegal acts by which assets and funds of FCFCU were transferred are the following:

A. During the years prior to November, 1988 Franklin Community Federal Credit Union paid the personal expenses of Lawrence E. King, Jr. and his family totalling at least $10,729,128.

B. Funds of Franklin Community Federal Credit Union were fraudulently and without consideration transferred to or paid on behalf of corporations and entities owned, controlled or managed by defendant Lawrence E. King, Jr. totalling at $1,985,765.

C. Under the direction, control and supervision of Lawrence E. King, Jr. and the Board of Directors, funds were received by Franklin Community Federal

Credit Union for which certificates were issued without the funds or the certificates being shown on the books of the credit union. Interest payments and redemptions were paid upon those certificates, funded by the sale of further certificates, also not recorded on the books of the Credit Union. The management of the funds and the perpetuation of the scheme required a number of personnel and payroll and other expenses far in excess of the legitimate needs of the Credit Union.

12. From 1975 until the date of the closing Mr. Earl Thomas Harvey, Jr. was an employee of FCFCU and had primary control of the bookkeeping and other financial functions of the Credit Union. During those years he misappropriated to his own use or that of his family, funds of the Credit Union totalling at least $783,447.

13. The losses set forth above resulting from the actions of Lawrence E. King, Jr. and Earl Thomas Harvey, Jr. were proximately caused by the negligence, inaction, mismanagement and breach of fiduciary duty by the Board of Directors, and each member thereof, in that they:

A. Attempted to abdicate their responsibilities and rely exclusively upon the periodic examinations of the NCUA for the management of the Credit Union.

B. Failed to conduct or cause to be conducted annual audits of the financial statements of the Credit Union since the Fall of 1984, even though required by statute, 12 U.S.C. § 1756, and repeatedly requested and directed to do so by the National Credit Union Administration.

C. Ignored warnings and directives of the NCUA examiners.

D. Delegated excessive authority and discretion to credit union officials, and in particular Mr. Lawrence E. King, Jr., and Mr. Earl Thomas Harvey, Jr.

E. Failed to supervise or attempt to supervise the activities of Credit Union officers and employees.

F. Violated, or permitted the Credit Union to violate, various federal regulations and statutes.

G. Ignored complaints by employees of improprieties.

H. Ratified and approved without question the activities of Lawrence E. King, Jr. and Earl Thomas Harvey, Jr.

I. Allowed the financial affairs and records of the Credit Union to become hopelessly commingled with the personal and business affairs and records of Lawrence E. King, Jr. and Consumer Services Organization.

J. Made no inquiry or attempt to determine the source of funds for Mr. Lawrence E. King, Jr.'s vast personal expenditures and ignored public knowledge of improprieties.

K. Caused and allowed the Credit Union to sell and broker share certificates and certificates of deposit in excess of its needs and in excess of the Credit Union's ability to reinvest profitably.

L. Failed to ascertain or inquire how the Credit Union was able to offer share certificates and certificates of deposit at high rates of interest.

M. Failed to ascertain or inquire how the Credit Union was able to pay hundreds of thousands of dollars in commissions to "Development Officers."

N. Negligently allowed Lawrence E. King, Jr. to determine persons to be elected replacement members of the Board of Directors and electing replacements without qualifications.

O. Neglected to ascertain that the Credit Union had sold and was selling and renewing certificates for at least $35,000,000 in excess of the liabilities shown on the Credit Union's financial statement.

P. Failed to direct, supervise and review the activities of the supervising committee.

14. By virtue of the above and foregoing, there is now due to the plaintiff from the defendants the sum of $39,084,454.

WHEREFORE, the plaintiff prays judgment against the defendants, and each of them, in the amount of $39,084,454, together with its costs expended herein.

SECOND CLAIM -- SUPERVISORY COMMITTEE

15. Plaintiff incorporates by reference herein the allegations of paragraphs 1 through 12 above as though hereinafter set forth in full.

16. a. Dr. Paul Lee is a resident of Omaha, Douglas County, Nebraska, and was a member of the Supervisory Committee of FCFCU from April 1, 1983 through October 1985.

b. Dr. William Johnson is a resident of Omaha, Douglas County, Nebraska, and was a member of the Supervisory Committee of FCFCU from April 1, 1983 to October 1985.

c. Defendant Thelma Dean is a resident of Omaha, Douglas County, Nebraska, and was a member of the Supervisory Committee of FCFCU in 1984 and 1985.

d. Defendant Tommy Davis is a resident of Omaha, Douglas County, Nebraska, and was a member of the Supervisory Committee of FCFCU in 1985, 1986, and 1987.

e. Defendant Tommy Adams is a resident of Omaha, Douglas County, Nebraska, and was a member of the Supervisory Committee of FCFCU in 1985, 1986, and 1987.

f. Defendant Glenn Thomas is a resident of Omaha, Douglas County, Nebraska, and was a member of the Supervisory Committee of FCFCU in 1985, 1986, and 1987.

g. Defendant June Swanigan is a resident of Omaha, Douglas County, Nebraska, and was a member of the Supervisory Committee of FCFCU from _____ to the date of liquidation.

h. Defendant S. P. Benson is a resident of Omaha, Douglas County, Nebraska, and was a member of the Supervisory Committee of FCFCU from _____ to the date of liquidation.

i. Defendant Nigel McPherson is a resident of Omaha, Douglas County, Nebraska, and was a member of the Supervisory Committee of FCFCU from _____ to the date of liquidation.

j. Defendant Jean Rodgers is a resident of Omaha, Douglas County, Nebraska, and was a member of both the Board of Directors and the Supervisory Committee of FCFCU from October 8, 1985 to the date of its liquidation.

17. The Supervisory Committee of the Federal Credit Union was established and members were appointed by the Board of Directors pursuant to the requirements of 12 U.S.C. § 1761 and 1761(d). The Supervisory Committee is specifically charged under the statute, 12 U.S.C. § 1761(d) with the responsibility that it "shall make or cause to be made an annual audit and shall submit a report of that audit to the Board of Directors and a summary of the report to the members at the next annual meeting of the Credit Union." That statute further authorizes the Supervisory Committee to suspend members of the Board of Directors, or the Credit Committee, and to call special meetings of the membership of the Credit Union to consider violations of the statutes, charter or bylaws or to consider unsafe practices.

18. The loss to the Credit Union described in paragraph 9 above was proximately caused by the negligence and breach of fiduciary duty by the defendants and each of them as members of the Supervisory Committee of FCFCU, in that: (1) Between, the annual audit as of July 31, 1984 and the liquidation of the Credit Union in November of 1988, no annual audits were conducted or required by the Supervisory Committee, even though repeatedly directed to do so by the NCUA examiners. (2) Defendants totally failed in any way to supervise the activities of the officers and directors of the Credit Union.

19. By virtue of the above and foregoing, there is now due to the plaintiff from the defendants, and each of them, the sum of $39,084,454.

WHEREFORE, th eplaintiff prays judgment against the defendants, and each of them, in the amount of $39,084,454, together with its costs expended herein.

FD-302 (REV. 3-10-82)

FEDERAL BUREAU OF INVESTIGATION

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Date of transcription 12/15/89

Yutan, Nebraska, telephone number was interviewed by Special Agent (SA) of the Federal Bureau of Investigation (FBI) and SA of the Internal Revenue Service (IRS). was being interviewed in the FBI Office where he voluntarily appeared to be interviewed. was being interviewed regarding his employment at FRANKLIN COMMUNITY FEDERAL CREDIT UNION (FCFCU). provided the following information:

advised he began his employment at FCFCU in March, 1984, and continued his employment until the credit union was closed November 4, 1988. was employed in the Accounting Department at the time of the closure of the credit union. He had the authority to sign checks, along with and other former employees of the credit union. was responsible for posting of checks and other duties which were previously handled by sister of was trained by was aware of the account number 8888-1, known as the FRANKLIN Account, where various expenditures, involving expenditures on behalf of and the credit union, were withdrawn from. advised monies from the sale of certificates of deposit were deposited into FCFCU after they were received at FRANKLIN's Account at FIRSTIER.

was of the opinion President, FCFCU was taking advantage of the FRANKLIN Account because personal bills consisting of jewelry, American Express, and florists, to name a few, were being paid by this account, when in fact they were for personal expenses of advised he believed a better accounting for this could have been done, and had several discussions with and advised checks were issued which would reveal a withdraw from the 1317 Account, known as CONSUMER SERVICES ORGANIZATION (CSO). However, posting monies were actually withdrawn from FRANKLIN's Account with monies deposited into FRANKLIN's Account. A paper trail would reveal those monies being withdrawn from the 1317 Account, but in fact they were not.

Investigation on 12/12/89 at Omaha, Nebraska File # OM 147A-633

by SA Date dictated 12/12/89

This document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaned to OMAHA your agency; it and its contents are not to be distributed outside your agency.

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[redacted] advised he was responsible for obtaining change orders for FCFCU to operate on. [redacted] and [redacted] would personally pick up change orders from FIRSTIER and bring them back to FCFCU for operating cash. Normal change orders consisted of $80,000 to $100,000 in currency. Later in FCFCU's operation, WELLS FARGO was hired to deliver this currency to FRANKLIN's location in the North Omaha area and South Omaha area. Tellers would issue cash tickets for money to be used at their teller station and the regular accounting of their teller stations were maintained by himself or the head teller, which was [redacted]

[redacted] advised as a signor of checks on behalf of FCFCU, he could recall on several occasions signing checks which were blank on behalf of [redacted] who was paying the bills on behalf of [redacted] On one occasion [redacted] signed green checks taken by [redacted] from FCFCU. [redacted] was traveling, and was going to need the checks signed, even though [redacted] had signature authority on the checks. Those checks were blank.

[redacted] was shown a counter check which was obtained at FIRSTIER, dated October 5, 1987, made to the order of FIRSTIER BANK OF OMAHA in the amount of $112,000, signed by [redacted] reviewed the check, advised the printing of the check was his, and that the signature of [redacted] was his. After review of the check, [redacted] advised he was given instruction by [redacted] to obtain a counter check and purchase a cashiers check for $112,000 from FIRSTIER. The cashiers check was made out to [redacted] for the $112,000. The instructions were handwritten out on a piece of paper which was given to [redacted] by [redacted] returned with the cashiers check for the $112,000 and the instructions and gave them back to [redacted] advised this was not a normal procedure, however, he believes he may have obtained cashiers checks through the signing of counter checks at FIRSTIER on two other occasions. [redacted] could not recall the specifics regarding those two other times. [redacted] was not informed why the $112,000 was needed, and could not provide any information regarding the purchase of CAFE CARNIVAL or any other business related to [redacted] or [redacted] had no instructions or contact with [redacted] regarding the $112,000 counter check and the obtaining of the cashiers check.

[redacted] advised he obtained, from [redacted] $10,900 to purchase a 1978 Corvette. [redacted] had conversations with [redacted] about his personal vehicle and the condition of that vehicle which was in poor operation. As a result, [redacted]

arranged through his mother, [redacted] the gift of $10,900. No loan papers were ever signed or arranged by [redacted] for the purchase of the Corvette. The 1978 Corvette was purchased from HUBER CHEVROLET, and was driven by [redacted] until January, 1988, at which time [redacted] sold the vehicle back to HUBER CHEVROLET for $8,000. [redacted] used the $8,000 to pay personal bills. No money was paid back to [redacted] or [redacted] advised he deposited the $10,900 into his bank account at THE BANK OF YUTAN, Nebraska. [redacted] he did not receive $12,000 in a gift of money from [redacted].

[redacted] advised that in addition to the above money, he received a trip to Orlando, Florida, which was arranged through the ROYAL TRAVEL AGENCY by [redacted] at the instruction of [redacted] took his wife and two children in April, 1988, to Orlando. The travel package was provided to him by [redacted] and included air fare, hotel, entrance to DISNEYWORLD, and transportation. [redacted] advised because of his hard work and the sacrifices he was making by not seeing his family at FCFCU, [redacted] told him to take a vacation that was provided to him. [redacted] advised that total travel package cost $4,000 and was paid in full by [redacted] at the instruction of [redacted].

[redacted] advised that while employed at FCFCU, he maintained several credit cards of which he has one card for the purchase of gasoline. Credit cards included the Chase Manhattan Visa, American Express, Phillips 66, American Charter Visa, JC Penneys, Standard Oil, and Brandeis.

[redacted] advised he received no other funds, gifts, or other personal merchandise from anyone affiliated with FCFCU or the principals of FCFCU.

File - Serial Charge Out
FD-5 (Rev. 6-17-70)

File _____ _____ _____ Date _____
Class. Case No. Last Serial

☐ Pending ☐ Closed

Serial No.	Description of Serial	Date Charged
	Serial 434, 435 transfer to Sub D.	

_____
Employee

RECHARGE Date _____

To _____ From _____

Initials of Clerk _____ _____ _____ Date _____ _____ _____

_____
Date charged

_____
Employee

_____
Location

FD-515 (Rev.9-20-89)

Accomplishment Report

(Effective 10/1//89)

(Submitt within 30 days from date of accomplishment)

TO: **Director, FBI**

Date 12/15/89

FROM: **SAC,** OMAHA

SUBJECT:

[redacted]

ET AL

BANK FRAUD-IRS

OO: OMAHA

Bureau File Number
147A-571
Field Office File Number
4
Squad or RA Number
[redacted]
Agent's Social Security No.

☒ X if a joint operation with: IRS (identity of other agency)

☐ X if case involves corruption of a public official (Federal, State or Local).

Investigative Assistance or Technique Used

Were any of the investigative assistance or techniques listed below used in connection with accomplishment being claimed? ☒ No ☐ Yes - If Yes, rate each used as follows:

1 = Used, but did not help 3 = Helped, substantially

2 = Helped, but only minimally 4 = Absolutely essential

1. Acctg Tech Assistance Rating	8. Eng. Sect. Tape Exams Rating	15. Photographic Coverage Rating	22. Telephone Toll Recs Rating
2. Aircraft Assistance	9. Hypnosis Assistance	16. Polygraph Assistance	23. UCO Group I
3. Computer Assistance	10. Ident Div Assistance	17. Search Warrants Executed	24. UCO Group II
4. Consensual Monitoring	11. Informant Information	18. Show Money Usage	25. UC Other
5. ELSUR - FISC	12. Lab Div Exams	19. Surveil. Sqd. (SOG) Asst	26. NCAVC/ VI-CAP
6. ELSUR - Title III	13. Lab Div Field Support	20. SWAT Team Action	27. Visual Invest - Analysis (VIA)
7. Eng. Sect. Field Support	14. Pen Registers	21. Tech. Agt. or Tech Equip	

b6
b7C

A. Preliminary Judicial Process (Number of subjects)

Complaints	Informations	Indictments
		1

B. Arrests, Locates, Summonses or Subpoenas Served (No. of Subj.)

	Subject Priority* A	B	C
FBI Arrests -			
FBI Locates -			
Local Arrests -			

FBI Subj. Resisted _____ ; Armed _____

Subpoenas Served _____

Criminal Summons 1

Local Crim. Summons _____

C. Release of Hostages or Children Located: (Number of Hostages or Children Located)

Hostages Held By Terrorists _____; All Other Hostage Situations _____

Missing or Kidnaped Children Located _____

D. Recoveries, Restitutions, or Potential Economic Loss Prevented (PELP) (Explain valuation in remarks)

Property Type Code*	Recoveries	Restitutions	PELP Type Code*	Potential Economic Loss Prevented
	$	$		$
	$	$		$
	$	$		$
	$	$		$
	$	$		$

E. Civil Matters

RICO - Civil Convictions _____ No. of Subj.

	Government Defendant	Government Plaintiff
Civil Suits Amount of Suit	$	$
Settlement or Award	$	$ Enter AFA Payment Here

F. Seizures/Forfeitures

Property Type Code*	Seizures	Forfeitures Judicial	Forfeitures Administrative

G. Administrative Sanctions

Subject 1 Subject Description Code* -

☐ Suspension ☐ Debarment — Time Frame: Years _____ Months _____ ☐ Permanent

Subject 2 Subject Description Code* -

☐ Suspension ☐ Debarment — Time Frame: Years _____ Months _____ ☐ Permanent

H. Final Judicial Process: Judicial District _____ District _____ State

Conviction or Pretrial Div. Date _____ Sentence Date _____

No. of Subjects _____ Acquitted _____ Dismissed

Subject 1 Subject Description Code* -

☐ Felony ☐ Misdemeanor ☐ Parole Revocation ☐ Probation Revocation

Conviction Title	Section	Counts	Combined Sentence In-Jail Yrs. Mos.	Suspended Yrs. Mos.	Probation Yrs. Mos.

Total Fines $ _____

☐ Plea ☐ Trial ☐ Pretrial Diversion

Add consecutive sentences together. Enter longest single concurrent sentence. Do not add concurrent sentences together. Sentence 10 yrs. - 8 yrs. susp. = 2 yrs. In-Jail.

Subject 2 Subject Description Code* -

☐ Felony ☐ Misdemeanor ☐ Parole Revocation ☐ Probation Revocation

Conviction Title	Section	Counts	Combined Sentence In-Jail Yrs. Mos.	Suspended Yrs. Mos	Probation Yrs. Mos.

Total Fines $ _____

☐ Plea ☐ Trial ☐ Pretrial Diversion

Add consecutive sentences together. Enter longest single concurrent sentence. Do not add concurrent sentences together. Sentence 10 yrs - 8 yrs susp. = 2 yrs In-Jail.

Attach additional forms if reporting final judicial process on more than two subjects, and submit a final disposition form (R-84) for each subject.

Remarks: (For every subject reported in Sections A, B, E, G, or H above, provide name, DOB, race*, sex, and if available POB and SSAN.

147A-571-1636

On 12/14/89, [redacted] was indicted by FGJ, District of Nebraska, Omaha, Nebraska, on one count of a violation T 18, USC, Section 1344. [redacted] is described as a black female born [redacted]

Secret

2 — Bureau
(2) — Field Office Omaha (1) - 147A-571) (1 - 66-3089)
* See reverse side for codes

MAM:kls (4)

Filed

FBI/DOJ

FD-515 (Rev.9-20-89)

Accomplishment Report

(Effective 10/1/89)

(Submit within 30 days from date of accomplishment)

TO: **Director, FBI**

FROM: **SAC,** OMAHA

SUBJECT:

[redacted]

ET AL

FAG_BF, TAXES

OO: OMAHA

Bureau File Number
147A-571
Field Office File Number
4
Squad or RA Number

[redacted]

☒ X if a joint operation with: IRS (Identity of other agency)

☐ X if case involves corruption of a public official (Federal, State or Local).

Date 12/14/89

Investigative Assistance or Technique Used

Were any of the investigative assistance or techniques listed below used in connection with accomplishment being claimed? ☐ No ☒ Yes - If Yes, rate each used as follows:

1 = Used, but did not help 3 = Helped, substantially

2 = Helped, but only minimally 4 = Absolutely essential

	Rating		Rating		Rating		Rating
1. Acctg Tech Assistance		8. Eng. Sect. Tape Exams		15. Photographic Coverage		22. Telephone Toll Recs	
2. Aircraft Assistance		9. Hypnosis Assistance		16. Polygraph Assistance		23. UCO Group I	
3. Computer Assistance		10. Ident Div Assistance		17. Search Warr Executed		24. UCO Group II	
4. Consensual Monitoring		11. Informant Information		18. Show Money Usage		25. UC Other	
5. ELSUR - FISC		12. Lab Div Exams		19. Surveil Sqd. (SOG) Asst		26. NCAVC/ VI-CAP	
6. ELSUR - Title III		13. Lab Div Field Suppor		20. SWAT Team Action		27. Visual Invest - Analysis (VIA)	
7. Eng. Sect. Field Suppo		14. Pen Registers		21. Tech. Agt. o Tech Equip			

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b7C
b7E

A. Preliminary Judicial Process (Number of subjects)

Complaints	Informations	Indictments

B. Arrests, Locates, Summonses or Subpoenas Served (No. of Subj.)

	Subject Priority* A	B	C
FBI Arrests -			
FBI Locates -			
Local Arrests -			

FBI Subj. Resisted _____ ; Armed _____

Subpoenas Served _____

Criminal Summons _____

Local Crim. Summons _____

C. Release of Hostages or Children Located: (Number of Hostages or Children Located)

Hostages Held By Terrorists _____; All Other Hostage Situations _____

Missing or Kidnaped Children Located _____

D. Recoveries, Restitutions, or Potential Economic Loss Prevented (PELP) (Explain valuation in remarks)

Property Type Code*	Recoveries	Restitutions	PELP Type Code*	Potential Economic Loss Prevented
	$	$		$
	$	$		$
	$	$		$
	$	$		$
	$	$		$

E. Civil Matters

RICO - Civil Convictions _____ No. of Subj.

Civil Suits Amount of Suit

Settlement or Award

Government Defendant	Government Plaintiff
$	$
$	$ Enter AFA Payment Here

F. Seizures/Forfeitures

Property Type Code*	Seizures	Forfeitures Judicial	Forfeitures Administrative

G. Administrative Sanctions

Subject 1 Subject Description Code* -

☐ Suspension ☐ Debarment

Time Frame: Years _____ Months _____ ☐ Permanent

Subject 2 Subject Description Code* -

☐ Suspension ☐ Debarment

Time Frame: Years _____ Months _____ ☐ Permanent

H. Final Judicial Process: Judicial District NE (District / State)

9/15/89 Conviction or Pretrial Div. Date

12/8/89 Sentence Date

No. of Subjects _____ Acquitted _____ Dismissed

Subject 1 Subject Description Code* -

☒ Felony ☐ Misdemeanor ☐ Parole Revocation ☐ Probation Revocation

☒ Plea ☐ Trial ☐ Pretrial Diversion

Conviction Title	Section	Counts	Combined Sentence In-Jail Yrs.	Mos.	Suspended Yrs.	Mos.	Probation Yrs.	Mos.
26	7206	2		5			3	

Total Fines $ 2,250

Add consecutive sentences together. Enter longest single concurrent sentence. Do not add concurrent sentences together. Sentence 10 yrs. - 8 yrs. susp. = 2 yrs. In-Jail.

Subject 2 Subject Description Code* -

☐ Felony ☐ Misdemeanor ☐ Parole Revocation ☐ Probation Revocation

☐ Plea ☐ Trial ☐ Pretrial Diversion

Conviction Title	Section	Counts	Combined Sentence In-Jail Yrs.	Mos.	Suspended Yrs.	Mos.	Probation Yrs.	Mos.

Total Fines $

Add consecutive sentences together. Enter longest single concurrent sentence. Do not add concurrent sentences together. Sentence 10 yrs. - 8 yrs susp. = 2 yrs In-Jail

Attach additional forms if reporting final judicial process on more than two subjects, and submit a final disposition form (R-84) for each subject.

147A-571-637

Remarks: (For every subject reported in Sections A, B, E, G, or H above, provide name, DOB, race*, sex, and if available POB and SSAN.

On 12/8/89, USDJ LYLE STROM sentenced [redacted] subject, to 3 years probation, 5 months in-house jail, which [redacted] is to pay $250 each month and fined $1,000 for a violation of T 26, USC, Section 7206 (1), tax perjury. [redacted] was indicted for two counts T 26, USC, Section 7206 (1) and one count T 18, USC, Section 1623, which was dismissed. [redacted] is a white male born [redacted]

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b7C

R-84 being submitted by OMAHA.

2 - Bureau
2 - Field Office
* See codes on reverse side.

2 - Omaha (1 - 147A-571) (1 - 66-3089)

MAM:klj (4)

FBI/DOJ

FILED
DISTRICT OF NEBRASKA
AT _____ M
DEC 13 1989
Norbert H. Ebel, Clerk
By _____ Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

NATIONAL CREDIT UNION ADMINISTRATION BOARD, etc.,	)	CV 88-0-819, CV 88-0-918, CV 89-0-99
Plaintiff,	)	
vs.	)	MEMORANDUM AND ORDER
LAWRENCE E. KING, JR., et al.,	)	
Defendants.	)	

Presented to me is the motion of the National Credit Union Administration Board, as liquidating agent for the Franklin Community Federal Credit Union, ("NCUA") (filing 141, 88-0-819)[1] to compel the production of various books and records belonging to, in the possession of, or under the control of the defendant Lawrence E. King, Jr. King, in contrast, seeks a protective order from being forced to turn over the documents and respond to an interrogatory that required King to specify documents he had not produced upon an attorney-client privilege or work-product doctrine claim (filing 137). King also seeks a protective order (filing 137) prohibiting the taking of a records deposition regarding these documents, to the extent one is requested of King's present or former lawyers.

In this memorandum, I deal only with King's assertion of his privilege against self-incrimination under the fifth amendment to the Constitution and the question of whether King should be granted

[1]Unless otherwise indicated to the contrary in the text, all references to filing numbers will be to CV 88-0-819, although there are identical filings in the related cases appearing in the caption of this memorandum and order.

Serial 638

a protective order in that regard.[2] Other issues are to be resolved at a later date. I deal with this issue now in order that King's counsel can know as to other privilege questions whether they are obligated to identify certain documents as a condition precedent to asserting various privilege claims other than the fifth amendment claim. King's counsel tell me that they may need to identify documents with some particularity in order, for example, to assert an attorney-client privilege for a certain document. But King's lawyers are reluctant to make the identification for fear that the act of identifying the documents may be construed to be an incriminating testimonial act on the part of King violative of King's self-incrimination privilege or that the act of identification might otherwise waive the fifth amendment privilege claim. In other words, King's lawyers do not want to forego the self-incrimination privilege in order to assert another privilege. Submitted to me for in camera examination are four boxes of documents; a green or yellow piece of paper with the notation "5th" or "Fifth" is appended to each document for which the claim of self-incrimination is made. An ex parte typewritten exhibit list identifying the documents with some particularity has been received by the court and ordered sealed (filing 158). The exhibit list asserts for each numbered document the privilege(s) claimed by King with regard to each exhibit. Some of the documents

[2]Thus, at this time I will not deal with King's motion to stay discovery (filing 138), but I will defer ruling on that motion until all the privilege claims have been submitted.

also have privilege claims in addition to the fifth amendment claim.

I. FACTS[3]

King faces a forty-count criminal indictment in this court alleging among other things that King participated in a conspiracy to defraud the United States by impeding the Internal Revenue Service and the NCUA. (Filing 152, Def's Exh. 1, Count I). This conspiracy is predicated upon the claim that King abused the Franklin Community Credit Union ("Franklin") and the Consumer Services Organization, Inc. ("CSO") while King was manager of the former and president of the latter. (Filing 152, Def's Exh. 1, Count 1, A & B). King and his family are said to have embezzled more than twelve million dollars from Franklin, and part of the conspiracy was alleged to involve the filing of false income tax returns. The conspiracy is said to have spanned between the dates of July 1, 1976 and May 19, 1989, the date the indictment was handed up. King asked for and received court-appointed counsel in the criminal case, and court-appointed counsel have received permission to enter a limited appearance in the civil case against King, but counsel have been precluded from initiating discovery in the civil case without express approval of this court if they wish

[3]The United States of America is not a party to this action. The statements of the court made herein are not intended to be used for any purpose in proving or disproving the merits of the indictment in the criminal case styled United States of America v. Lawrence E. King, Jr. and Alice Ploche King, CR 89-0-63 or in any related criminal cases.

to be paid under the Criminal Justice Act for such services. (Filing 152, Def's Exh. 11).[4]

King is sued, or is otherwise involved, in these civil cases because the NCUA claims that King and others devoted the resources of Franklin to the personal benefit of the various defendants. (See Filing 1 (Complaint)). King is only a party in one case, and King's court-appointed counsel have entered an appearance in only one case, CV 88-0-819. The civil complaint against King was filed before the criminal indictment was handed up. (Id.) In the civil complaint against King, it is contended that from about 1970 to

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[4]King's lawyers argue that I also prohibited King personally from taking discovery in the civil case when I entered my orders in the criminal case instructing King's lawyers in the criminal case as to what their duties were in the civil case. There is no such explicit limitation in any of the orders issued in the criminal case insofar as King personally is concerned. (See Filing 152, Def's Exh. 11, pp. 6-7 & n.2). I did acknowledge in oral comments from the bench in the criminal case that if King attempted to use discovery in the civil case to frustrate the discovery limitations in the criminal case inherent in the Federal Rules of Criminal Procedure, such action would likely be prohibited. Because I may have inadvertently confused King individually, I wish to clarify now that such comments were not intended to limit King or any lawyers he retains privately in the civil case from initiating proper discovery in the civil case. While some civil discovery devices may well frustrate the Federal Rules of Criminal Procedure in a given circumstance, the court should deal with those questions on a case-by-case basis. I will leave it to the United States to seek a protective order in the civil case if it believes that its interests are being harmed in the criminal case should King pro se or with retained counsel seek discovery in the civil case. My written instructions to King's court-appointed counsel, however, have not changed. I emphasize that King's lawyers in the criminal case are entitled to seek permission to engage in civil discovery by filing a request in the criminal case should they think that discovery in the civil case is necessary to assert or protect a claimed privilege applicable in the criminal case which may be waived or impaired in the civil case absent discovery in the civil case, e.g., defending the attorney-client privilege from the crime/fraud exception.

November of 1988 King engaged in fraudulent, dishonest and illegal acts involving the transfer of Franklin assets in an amount in excess of thirty-four million dollars. (Id.) Among other things, the suit against King prays for a judgment against King in excess of thirty-four million dollars, restitution, the imposition and declaration of a constructive trust, and for an accounting. (Id.) In each of these civil cases, King and his court-appointed counsel have been served with requests to produce and also an interrogatory. (See Filing 137, Exhs. A & B).

The requests to produce, which are addressed to King and his appointed counsel, state in pertinent part: "[P]laintiff requests that the defendant, [King], produce and permit the plaintiff to inspect and copy the following documents and evidence ...." (Id., Exh. A). Request number 1 sought: "All documents in his possession produced, received by him or by his present counsel from Erickson & Sederstrom, P.C. relating to [King, his wife, related corporations including Franklin] and any trusts established by [King and his wife]." (Id.) Request number 2 sought: "Any other documents not previously produced relating to the subject matter set forth in plaintiff's Complaints in these matters." (Id.)

One interrogatory which was served on King is at issue here. It asked King to identify with particularity any document he refused to produced based upon a claim of the attorney-client privilege or the work-product doctrine in as much detail as was possible without disclosing its contents, including a specification as to the general nature, the identity and position of the author,

the date, the identity and position of the addressee, the identity and position of all persons who were given copies, the document's present location, the identity and position of the custodian, and the specific reason(s) why the document was withheld from production. (Id., Exh. B).

There is no evidence that King's court-appointed lawyers have ever been served with a subpoena to produce the documents.

King was previously represented by the law firm of Erickson & Sederstrom in virtually all of King's legal affairs during the pertinent times, and the firm represented King in the one civil case until the firm was allowed to withdraw on March 22, 1989. (Filing 90). On February 16, 1989 a records deposition was taken of the law firm of Erickson & Sederstrom by the NCUA. (Filing 141, Attachment, Exh. 2). Apparently, Erickson & Sederstrom was served with a subpoena and a notice of deposition. (Id., Exh. 1). The notice of deposition was addressed to King, his wife and an Erickson & Sederstrom lawyer. (Id.) In that records deposition Erickson & Sederstrom told an NCUA lawyer that Erickson & Sederstrom was appearing on its own behalf and not for King. (Id. 5:25-6:7). King was not represented and did not appear at the deposition. (Id. 4:1-8). Erickson & Sederstrom refused to produce anything related to "Mr. King's tax problems," communications between King and Erickson & Sederstrom, "anything that Mr. King sent to [Erickson & Sederstrom] in [its] capacity as counsel for [its] review and [its] confidential communication back to him," and "anything that is work product." (Id. 9:5-14). The records that

are at issue here were evidently in the possession of Erickson & Sederstrom during the records deposition. (Id. 10:5-11).

King was deposed for a second time in the civil case on March 31, 1989. (Id., Exh. 11). During that deposition King was not represented by counsel, but he acknowledged that his previous counsel had advised him "generally of [his] rights in a deposition" and that he understood that he had a right to refuse to answer questions which might tend to incriminate him. (Id., Exh. 10 (Deposition), 2:1-14). During that deposition, King said that he had no objection if counsel for NCUA "look[ed] at the records that Erickson & Sederstrom ha[d]." (Id. 3:6-18).

On April 20, 1989, Erickson & Sederstrom wrote counsel for the NCUA and set forth a twenty-page description of the various documents which had been withheld and keyed to various assertions of attorney-client privilege or work-product claim. (Id., Exh. 3). On May 15, 1989 an NCUA lawyer wrote Erickson & Sederstrom indicating that King had waived, in writing, the attorney-client privilege, and as a consequence the NCUA wanted to obtain the remainder of the documents. (Id., Exh. 4 (no copy of the waiver is attached to the letter, despite the fact that the letter states that a copy was attached)). After King was indicted on May 19, 1989, King's court-appointed counsel instructed Erickson & Sederstrom to refuse to produce the documents. (Id., Exhs. 5 & 6).

Although the record is not clear as to precisely where the documents have been since the records deposition in February of 1989, the documents apparently have been in the possession of King,

Erickson & Sederstrom, or King's court-appointed lawyers. At the time they were produced to the court, King and his court-appointed counsel were present in the courtroom, and no one from the Erickson & Sederstrom firm was present. King's court-appointed counsel, when asked by counsel for the NCUA at the hearing on these motions whether King or the lawyers were in "possession" of the documents, refused to answer the question. The NCUA has orally amended its request to produce such that the NCUA agrees that it is not entitled to anything in King's actual possession or authored since the appointment of King's court-appointed counsel.

It is clear from the record that there was an active criminal investigation of King at least as early as August of 1985. (Filing 152, Def's Sealed Exh. 13).[5] Erickson & Sederstrom was aware of this investigation in August of 1985. (Id.) The IRS sought to summons by administrative summons Franklin, through an employee, to produce records involving personal banking transactions relating to King on the 16th of December 1986. (Filing 141, Attachment, Exh. 12). Erickson & Sederstrom, apparently also representing Franklin, advised King not to turn over the documents and moved to quash the process. (Id., Exh. 13). On behalf of King and his wife, Erickson & Sederstrom argued before this court that the IRS process

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[5]I received this evidentiary exhibit for in camera ex parte examination based upon the representation that the exhibit, if disclosed, might reveal a privilege. Having examined the exhibit, and particularly the attachment thereto, I conclude that the attachment (if not the facts recited therein) may well be subject to a valid attorney work-product claim, the revelation of which in support of the fifth amendment privilege claim might have waived the work-product claim as to the document. I therefore continue to decline to make this exhibit available to counsel for the NCUA.

should be quashed, for, among other reasons, the summons would violate King's fifth amendment privilege. (Id., Exh. 14, page 2).

II. LAW

King argues that the documents should not be produced or otherwise identified by answer to interrogatory because: (a) the contents of the documents are testimonial in nature, incriminating in effect, and generated under government compulsion; and (b) the act of identifying and producing the documents would be a testimonial, incriminating act independent of the contents of the documents which, if compelled by the court, would violate King's fifth amendment privilege. The NCUA responds, stating: (a) the contents of many of the documents cannot be subject to the fifth amendment privilege because the documents were not generated under any government compulsion; (b) many of the documents are not covered by the fifth amendment privilege because they are the records of various corporations and not of King; (c) King has waived the privilege; (d) the act of identifying the documents cannot violate the fifth amendment privilege because the NCUA will modify the request to produce to pertain only to documents in the possession of King's lawyers and therefore King need do nothing; (e) since Erickson & Sederstrom has already identified the documents, the act of production will not implicate King's fifth amendment privilege because Erickson & Sederstrom, not King, identified the documents; and (f) any fear of violating the fifth amendment privilege can be obviated by a protective order.

A. THE ACT OF PRODUCTION

I need not, and I do not, determine whether the documents were generated upon government compulsion[4] because I find generally that the privilege against self-incrimination applies even if the documents were voluntarily generated, since the act of producing and identifying the documents, if compelled by this court, would have testimonial aspects and an incriminating effect violative of King's fifth amendment privilege. See United States v. Doe, 465 U.S. at 612-13. The NCUA tacitly concedes this point when it agreed at oral argument to modify its document request to exclude documents in the actual possession of King; for reasons I shall discuss later, I do not find that this concession obviates the problem.

Without doubt, if King were to be compelled to respond to the request to produce (or to otherwise identify documents by answer to interrogatory), he would be establishing the existence, authenticity and possession or control of documents which by

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[4]From a review of the documents there is no question that many of the documents are "testimonial" and all of the documents are "incriminating." See Doe v. United States, 56 U.S.L.W. 4708, 4710 & nn. 5-8 (U.S. June 21, 1988) (holding that the compelled execution of a form authorizing banks to disclose account information was not testimonial for fifth amendment purposes because the form did not acknowledge that an account existed or that it was controlled by petitioner). The more difficult question is whether the documents were generated under some type of government compulsion because, if they were not, then the documents, as opposed to the act of production or identification, are not protected by the fifth amendment. United States v. Doe, 465 U.S. 605, 612 n.10 (1984) (stating: "If the party asserting the Fifth Amendment privilege has voluntarily compiled the document, no compulsion is present and the contents of the document are not privileged.").

definition are either relevant to the civil complaints or which may lead to the discovery of admissible evidence against King in the civil suits. Since it is beyond doubt that the civil complaints track the same ground as the criminal indictment, such production of documents relevant to the civil cases or which might lead to the discovery of admissible evidence in the civil cases would likewise compel the production of incriminating evidence by testimonial act insofar as the criminal case is concerned.

Analysis of the Federal Rules of Civil Procedure is instructive as a starting point. Federal Rule of Civil Procedure 34 requires that any party served with a request to produce "shall serve a written response ... stat[ing], with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated." Fed. R. Civ. P. 34(b). Federal Rule of Civil Procedure 33(a) requires that each interrogatory answer be signed under oath by the party answering the question. Id. 33(a). The request to produce is limited to those items "which are in the possession, custody or control of the party." Id. 34(a) (emphasis added). A request to produce documents must either request relevant documents or documents which will lead to the discovery of admissible evidence consistent with Federal Rule of Civil Procedure 26(b). Id. Interrogatories are likewise limited. Id. 33(b). A request to produce must specify "with reasonable particularity" the documents sought. Id. 34(b). If a motion to compel is granted in this case, it would be directed

to a "party" who would be compelled to "answer" an interrogatory or the party would be compelled to permit "inspection [of documents] in accordance with the request." Id. 37(a)(2).

The Supreme Court has recognized that the act of identifying and producing documents may involve testimonial incrimination:

> Although the contents of a document may not be privileged, the act of producing the document may be. A government subpoena compels the holder of the document to perform an act that may have testimonial aspects and an incriminating effect. As we noted in Fisher:
>
> > "Compliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or control by the taxpayer. It also would indicate the taxpayer's belief that the papers are those described in the subpoena. The elements of compulsion are clearly present, but the more difficult issues are whether the tacit averments of the taxpayer are both 'testimonial' and 'incriminating' for purposes of applying the Fifth Amendment. These questions perhaps do not lend themselves to categorical answers; their resolution may instead depend on the facts and circumstances of particular cases or classes thereof." [Fisher v. United States, 425 U.S.] at 410.

United States v. Doe, 465 U.S. at 612-13 (citations omitted).

In United States v. Doe the district court was faced with a federal grand jury investigation of corruption in the awarding of local governmental contracts. Subpoenas were served on the respondent as an owner of sole proprietorships demanding production of certain business records. The respondent then filed a motion in federal district court seeking to quash the subpoenas. The district court granted the motion (except as to records required by law to be kept or disclosed to a public agency), finding that

the act of producing the records would involve testimonial self-incrimination. The district court found as fact:

> "With few exceptions, enforcement of the subpoenas would compel [respondent] to admit that the records exist, that they are in his possession, and that they are authentic. These communications, if made under compulsion of a court decree, would violate [respondent's] Fifth Amendment rights. . . . The government argues that the existence, possession and authenticity of the documents can be proved without [respondent's] testimonial communication, but it cannot satisfy this court as to how that representation can be implemented to protect the witness in subsequent proceedings.

Id. at 613 n.11 (quoting In re Grand Jury Empanelled March 19, 1980, 541 F. Supp. 1, 3 (1981), aff'd, 680 F.2d 327 (3d Cir. 1982)). The Supreme Court affirmed, concluding that the factual determination of the district court found support in the record. Id. at 614.

In this case, the NCUA states that the act of production cannot prejudice King's fifth amendment rights, since the NCUA has agreed to limit its request to documents only in the hands of King's court-appointed counsel. See Fisher v. United States, 425 U.S. 391 (1976) (holding, among other things, that the fifth amendment privilege for accountant work papers obtained by a client and transferred to the hands of his attorney for purposes of securing legal advice did not apply where lawyers had been served with a summons because the client was not compelled to do anything). I find this argument unavailing for several reasons.

Initially it must be observed that King and King's court-appointed counsel have not been served with process in these cases pursuant to Federal Rule of Civil Procedure 45(b). King's

lawyers are not parties to this litigation, and King is a party in only one case. King's court-appointed counsel have not even entered a general appearance in the one civil case in which King is a party, but they have only entered a limited appearance pursuant to court order for the purposes of protecting King's rights in the criminal case. It is important to note that, as a general matter, "Rule 34 is limited to parties to the action." 4A J. Moore, J. Lucas & D. Epstein, Moore's Federal Practice ¶ 34.02[1] (2d ed. 1989) [hereinafter J. Moore]. Interrogatories are likewise limited to parties. Fed. R. Civ. P. 33(a).

Since court-appointed counsel in these cases came into possession of the documents by reason of their representation in the criminal case and not the civil cases, and since counsel has entered an appearance only to preserve King's rights in the criminal cases, it is doubtful whether King's court-appointed lawyers can be considered a "party" under Federal Rule of Civil Procedure 34. 4A J. Moore, supra, ¶ 34.17 n.8; Hickman v. Taylor, 329 U.S. 495, 504 (1947) (stating that statements of witnesses in the hands of a lawyer could not be procured under Rule 34, since the statements were not in possession of a party). While Erickson & Sederstrom may have been served with process, it is evident that Erickson & Sederstrom no longer has any of the documents. Accordingly, it appears that this court lacks the naked power to compel King's court-appointed counsel to produce the documents or answer the interrogatory as opposed to King himself.

Still further, I do not think that Fisher applies to this case even if I assume that King's court-appointed counsel were in physical possession of the records and this court had authority to direct King's court appointed-counsel to produce the documents and respond to the interrogatory. The Fisher Court held that the fifth amendment privilege would not apply to documents in the hands of a taxpayer's lawyer where the papers had been delivered to the lawyer for purposes of obtaining legal advice not specifically related to protecting the documents from compelled production, but the Court held that the attorney-client privilege would apply to stop production of the documents if the documents were otherwise privileged under the fifth amendment, assuming that the documents had been in the hands of the client. Fisher, 425 U.S. at 404-05. In other words, a client who transfers documents to a lawyer retained by the client to render legal advice, when documents are otherwise subject to the fifth amendment privilege, does not lose the privilege by the transfer, and the privilege is protected by the lawyer asserting the attorney-client privilege.

Fisher explicitly recognized that there may be situations where the actual physical possession of a document in the hands of a representative maybe meaningless because "constructive possession is so clear or relinquishment of possession so temporary and insignificant as to leave the personal compulsion upon the taxpayer substantially intact." Id. at 398 (citing Couch v. United States, 409 U.S. 322, 333 (1973)). King's case is an example of one of the constructive possession cases about which the Court spoke. It is

clear that the documents, if they were transferred to King's court-appointed counsel, were transferred only constructively for the very purpose of asserting the fifth amendment privilege. Four boxes of documents needed to be transferred to King's lawyers so they could in good faith review each and every document to determine what privileges might apply. There is no evidence that the documents were transferred to the lawyers for any purpose other than to allow them to assist King in asserting his privilege. Here, in order to grant the NCUA the relief it seeks, this court would necessarily have to require King as a party to direct his lawyers to turn over the documents transferred to the lawyers so they could tell King whether and how to assert the fifth amendment privilege. Thus, if the act of producing and identifying the documents, assuming that the documents had been in the hands of King, would have been protected by the fifth amendment privilege, the same acts are privileged on fifth amendment grounds while the documents were in the constructive possession of the lawyers for the purpose of asserting the fifth amendment privilege on behalf of King.

Moreover, even if the documents were not in the constructive possession of King's court-appointed lawyers, but had been delivered to them for some purpose other than for asserting the fifth amendment privilege, the act of producing and identifying the documents is still privileged on attorney-client privilege grounds according to Fisher, 425 U.S. at 404-05. The NCUA attempts to

avoid the Fisher holding in this regard by asserting the crime-fraud exception to the attorney-client privilege.

Essentially, the NCUA contends that King used Erickson & Sederstrom to unlawfully delay the IRS investigation, and thus King's court-appointed lawyers cannot shield documents produced as a result of that unlawful conduct. Even if I assume that the crime-fraud exception applies to the documents in the hands of Erickson & Sederstrom, the crime-fraud exception pierces only the attorney-client privilege as it might be asserted by Erickson & Sederstrom on behalf of King while the documents were in the hands of Erickson & Sederstrom. Clearly, if King now had the documents he could not be compelled under the fifth amendment to produce and identify the documents for the reasons explained above. This is true even if the crime-fraud exception might pierce the attorney-client privilege had the documents been in the hands of Erickson & Sederstrom because the crime-fraud exception is an exception to the attorney-client privilege and not the fifth amendment privilege.[7] If one assumes that King obtained the documents from Erickson & Sederstrom and transferred them to his court-appointed counsel the crime-fraud exception is still not applicable. There is no contention that court-appointed counsel participated in the crime or fraud. Thus, insofar as the act of production and

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[7]Pursuant to Federal Rule of Evidence 501, this court should look to Nebraska law to apply the crime-fraud exception. The crime-fraud exception applies only to the attorney-client privilege, Neb. Rev. Stat. § 27-5034(a) (Reissue 1985), and not to the fifth amendment privilege under the United States Constitution. Id. § 27-501 (Reissue 1985).

identification is concerned, even if there was a crime or fraud involved in Erickson & Sederstrom's actions taken at the request of King, court-appointed counsel can assert the attorney-client privilege as to the act of production or identification because those acts are in no way associated with the crime or fraud.

I thus conclude that the court-compelled act of producing and identifying the documents would violate King's fifth amendment privilege unless there is some other reason that the fifth amendment privilege is not applicable.*

B. CORPORATE RECORDS

The NCUA contends that the fifth amendment does not apply because many of the documents are corporate documents and they must be produced even if indirectly incriminating to the custodian. See Braswell v. United States, 56 U.S.L.W. 4681 (U.S. June 22, 1988). In Braswell, the Court held that where the president of two corporations was served with a subpoena as president of the corporations requiring him to produce the corporations' records,

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*The NCUA argues that it is asking only for documents that King's lawyers received from Erickson & Sederstrom, and thus there is nothing incriminating about King being required to produce and identify the documents since the request is not particularized as to anything but documents received from Erickson & Sederstrom lawyers. This argument is not persuasive. First, the NCUA contends that the documents were part of a crime or fraud and by definition the act of producing these documents and identifying them would be incriminating. Second, if the requests are not "particularized," then they are objectionable under Federal Rule of Civil Procedure 34(b). Third, if one construes the requests as particularized, e.g. request number 2, the only conclusion that can be fairly drawn is that these requests pertain to the subject matter of the NCUA's complaints, and thus, due to the similarity between the civil actions and the criminal case, the requests are necessarily incriminating.

the custodian of the records could not resist the process on the grounds that the act of production would indirectly incriminate the custodian. Id. at 4686. This was so because the custodian produces the record as an agent and not personally, and a corporation has no fifth amendment privilege. The Court was very careful to point out, however, that the act of production would be deemed that of the corporation, not the individual, and the government could make no evidentiary use of the "individual act" of production. Id.

The difficulty here is that, unlike in Braswell, King has not been served with process or a request indicating that King was to respond in his capacity as a custodian and, to the contrary, King has been served with a request addressed to him individually. Thus, as King is being asked to respond individually, the privilege is therefore applicable.

C. WAIVER

The NCUA argues that King has waived his fifth amendment privilege because of the testimony that he gave when he was deposed a second time. During that deposition, King indicated that he was aware of his fifth amendment privilege and at that time had no objection to the NCUA lawyer examining documents in the hands of Erickson & Sederstrom. This waiver argument must fail for a number of reasons.

First, even if King had voluntarily waived the fifth amendment privilege during the deposition, he subsequently withdrew the waiver before it was ever acted upon. The NCUA does not cite any

precedent, and I can find none, which suggests that King is precluded from withdrawing his waiver, particularly in the absence of some type of prejudice to the NCUA.

Second, the waiver was not effective. This court must "'indulge every reasonable presumption against waiver' of fundamental constitutional rights" and should "'not presume acquiescence in the loss of fundamental rights.'" Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (footnotes omitted) (quoting Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937); Hodges v. Easton, 106 U.S. 408, 412 (1882); Ohio Bell Tel. Co. v. Public Utils. Comm'n, 301 U.S. 292, 307 (1937)). The waiver occurred when King did not have counsel and before the indictment had been handed up by the grand jury in the criminal case. Moreover, the waiver relates to a large number of documents which were not in the hands of King at the time he tendered the waiver. Indeed, the waiver probably related to some documents which King might not have even seen, such as a memorandum of his previous counsel reciting a conference which counsel had with King (e.g., Filing 158, Def's Sealed Exh. 14, item 16).

I conclude that King withdrew his waiver before it was acted upon and that the waiver was not voluntary, knowing, or intelligent under the circumstances.

D. PREVIOUSLY IDENTIFIED

The NCUA argues that the possession, existence, and authenticity of the documents are a foregone conclusion because Erickson & Sederstrom, when asserting the attorney-client

privilege, identified certain documents in a letter dated April 20, 1989 (filing 141, Attachment, Exh. 3) from Erickson & Sederstrom to counsel for the NCUA.[9] Thus, the NCUA contends that possession, existence and authenticity were foregone conclusions. See United States v. Doe, 465 U.S. at 614 n.13; Fisher, 425 U.S. at 411. Basically, the NCUA argues that the act of producing and identifying the documents cannot be testimonial for fifth amendment purposes since the NCUA already knows of the existence of the documents.

I am not persuaded by this argument because at the time Erickson & Sederstrom asserted the attorney-client privilege in April of 1989 and purported to identify the documents Erickson & Sederstrom was not King's counsel, as the firm had been allowed to withdraw in March of 1989. Thus, the identification, for fifth amendment purposes, was not made by King or any agent authorized to, in effect, admit the existence, possession or authenticity of documents for fifth amendment purposes. This is particularly true because at the time Erickson & Sederstrom wrote the letter King had not yet been indicted.

If King were compelled to respond to the requests to produce or answer the interrogatory, King would be compelled to admit the truth of the Erickson & Sederstrom identification--he would be both

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[9]NCUA suggests that Erickson & Sederstrom also may have identified documents at the records deposition in February of 1989 when Erickson & Sederstrom was King's counsel. I have read the deposition transcript, and I find no explicit identification. Moreover, Erickson & Sederstrom made clear that it did not represent King at that records deposition and King was not present or represented (Filing 141, Attachment, Exh. 2, 4:1-8; 5:25-6:8).

explicitly and implicitly making a statement as to the existence of these documents. This King cannot be compelled to do. See Doe v. United States, 56 U.S.L.W. at 4712. Moreover, King is essentially asked in the first request to produce to confirm the accuracy of the Erickson & Sederstrom identification, and this request would require, if this court were to grant the NCUA's motion, King and his court-appointed counsel to use any knowledge they might have to confirm the accuracy of a third party's identification of documents. Once again, King cannot be compelled to use his knowledge, as this is a testimonial act. See id. Moreover, Nebraska evidence law makes clear that a privilege is not lost when the disclosure itself is privileged, Neb. Rev. Stat. § 27-511 (Reissue 1985), or where the disclosure was made without an opportunity to claim the privilege. Id. § 27-512(2). In this case there is no evidence that King authorized the disclosure for fifth amendment purposes, and King had very little meaningful opportunity to contest the disclosure for fifth amendment purposes because he had not yet been indicted and he was without counsel.

I conclude therefore that to require King to confirm the accuracy of the Erickson & Sederstrom identification would be to require an act of testimonial significance for fifth amendment purposes.

E. PROTECTIVE ORDER

The NCUA argues that this court can protect King by entering a protective order keeping any compelled response secret from the Justice Department. This requires King to exchange his

constitutional right against self-incrimination for a court order that is not binding upon the United States of America as plaintiff in the criminal case. In my view King has an absolute constitutional right to rely upon his fifth amendment privilege or to have the functional equivalent of immunity as to the use of the compelled response. See United States v. Doe, 465 U.S at 614-16; Kastigar v. United States, 406 U.S. 441, 443-47 (1972). In essence, a protective order must leave King "in substantially the same position as if [he] had claimed the Fifth Amendment privilege." Kastigar, 406 U.S. at 462.

A protective order is a problematic device for providing King with the equivalent of use immunity. Indeed, a treatise writer has stated that "whether the court, in a civil action, can provide protection equivalent to an immunity statute, as is needed if the claim of privilege is to be overcome, seems doubtful." 8 C. Wright and A. Miller, Federal Practice and Procedure § 2018, at 153 (1970) (footnote omitted). See Dienstag v. Bronsen, 49 F.R.D. 327, 329 (S.D.N.Y. 1970) (stating that the defendant's fifth amendment rights would be jeopardized even if civil discovery were conducted pursuant to a confidentiality order, while the defendant was preparing the defense of a related criminal action). In this case, there are real, practical problems with a protective order.

The NCUA is an independent agency in the executive branch of the United States of America. 12 U.S.C. § 1752a(a). Accountants for the NCUA are working closely with the Justice Department in the prosecution of the King criminal case. Although I do not question

for a moment the integrity of counsel for the NCUA, even if I were to restrict disclosure of documents to counsel for the NCUA the close working relationship in the criminal case of the NCUA's accountants with the Justice Department suggests that even inadvertent disclosure to the NCUA's own accountants would almost certainly cause the documents or their contents to fall into the hands of the Justice Department. In this connection, I note that at least some of the documents would probably require the assistance of accountants to fully understand the documents (e.g., Filing 158, Def's Sealed Exh. 14), items 140-144).

As indicated above, the NCUA is an independent agency in the executive branch of the United States. 12 U.S.C. § 1752a(a). Counsel for the NCUA suggests that I cannot lawfully stay discovery in this case because of the provisions of the statutes applicable to the NCUA which forbid a court to "restrain or affect the exercise of powers or functions of a liquidating agent" which in this case is the NCUA. Id. § 1787(a)(1)(B). The NCUA, however, apparently concedes that I have some authority to enter a protective order. The NCUA suggested at one of the oral arguments in this case that it wanted the documents from King for, among other purposes, to know whether it should commence other civil litigation. I have contemplated requiring the NCUA to accept any documents with the proviso that the NCUA do nothing with the documents until the King criminal trial is completed and any appeal concluded. If such an order or a similar order restricting use of

the documents would be entered, a serious question is raised as to the validity of such an order under 12 U.S.C. § 1787(a)(1)(B).

For example, and purely hypothetically, if the NCUA received a document from King showing the existence of a an asset in the possession of a third party allegedly belonging to Franklin, could this court impose a protective order stopping the NCUA from using the document at a trial or hearing held for the purpose of obtaining the asset from the third party, at least until such time as King's criminal trial, and any appeal, is concluded? The NCUA's brief seems to suggest that the NCUA would resist such an order by contending that such a stay violates the "no restraint" provisions of the statutes governing the NCUA. Brief in Opposition to the Motion for Stay and Motion for Protective Order at 4-5. This then puts King in the position of being potentially subject to additional litigation implicating King's fifth amendment privilege.

As a consequence of the foregoing, I conclude that a protective order will not provide King with the functional equivalent of use immunity. King is not required to accept the risk that his fifth amendment privilege will be compromised; rather, King is entitled to a reasonable guarantee that his privilege will be honored, and this the court cannot provide.

IT IS ORDERED:

1. The motion to compel (filing 141, CV 88-0-819) is denied in part as to all exhibits (filing 158) with respect to which King has claimed the fifth amendment privilege;

2. The motion for a protective order (filing 137, CV 88-0-819) is granted in part as provided herein:

a. the NCUA shall not seek by way of deposition or other discovery device to obtain from King, in his individual capacity, or King's court-appointed lawyers either the exhibits (filing 158) or the contents of the exhibits for which King has claimed the fifth amendment privilege;

b. in asserting the attorney-client privilege or work-product doctrine, King need not provide the NCUA (but he shall provide the court for in camera ex parte consideration) with a particularized listing of documents for which such claims are asserted if to do so would be to particularly identify a document for which the fifth amendment privilege claim has been sustained;

c. inasmuch as it appears that Erickson & Sederstrom no longer has any documents, the protective order as to that firm is denied as moot;

3. The balance of the issues having to do with Federal Rule of Criminal Procedure 16, the request for a complete stay of discovery, the attorney-client privilege and work-product doctrine claims shall be resolved at a subsequent hearing;

4. For purposes of appeal, this order is considered final by the undersigned.

DATED this 13th day of December, 1989.

BY THE COURT:

Richard G. Kopf
United States Magistrate

REC'D
DEC 15 89
U.S. ATTORNEY
OMAHA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA, Plaintiff, vs. LAWRENCE E. KING, JR. and ALICE PLOCHE KING, Defendants.	CR 89-0-63 MOTION TO AUTHORIZE ADDITIONAL ACTION WITHIN CRIMINAL JUSTICE ACT APPOINTMENT

COMES NOW Lawrence E. King, Jr., Defendant, and moves the Court for an Order permitting Court-appointed counsel to depose Robert Kirschner and attend certain depositions within their Criminal Justice Act appointment as more fully outlined below:

1. Court-appointed counsel has made a limited appearance in the civil proceeding captioned National Credit Union Administration Board (NCUAB) v. King, CV88-0-819, for the purpose of protecting the Defendant's constitutional statutory rights.

2. In the civil proceeding, the NCUAB has moved to compel production of documents from the files of former counsel for the Defendant, Erickson & Sederstrom, who represented the Defendant while a criminal investigation was underway which led to the Indictment in this case.

3. Counsel for the NCUAB in the civil proceeding is prepared to offer evidence that the attorney/client privilege does not apply to the documents in question based upon the crime/fraud exception. Counsel for the NCUAB has stated that Robert Kirschner will testify as a witness for the NCUAB with regard to the crime fraud exception. Mr. Kirschner and his accounting firm have worked under contract for the NCUAB in reconstructing the financial records of the Franklin Community Federal Credit Union.

4. Undersigned counsel believes that it is necessary to be granted the Court's permission to depose Mr. Kirschner in order to adequately prepare and contest the applicability of the crime-fraud exception in the civil proceeding. Further, a

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judicial determination regard the crime fraud exception in the civil proceeding may directly influence the discoverability and admissibility of the same documents in the criminal proceeding.

5. Counsel for the NCUAB in the civil proceeding has also indicated a desire to take the deposition of witnesses which the Defendant intends to call in connection with his assertion of the attorney/client privilege and work-product doctrine.

WHEREFORE, Lawrence E. King, Jr., Defendant, requests authorization under the Criminal Justice Act for payment of attorney fees incurred by Court-appointed counsel in conducting the deposition of Robert Kirschner and payment for time in attending depositions conducted by the NCUAB in the civil proceeding in connection with the attorney/client privilege matter.

Respectfully submitted,

LAWRENCE E. KING, JR., Defendant

By Marilyn N. Abbott

Marilyn N. Abbott #16339
Steven E. Achelpohl #10015
SCHUMACHER & ACHELPOHL
1823 Harney St., Suite 100
Omaha, NE 68102-1908
(402) 346-9000
Attorneys for Lawrence E. King, Jr.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the above and foregoing Motion to Authorize Additional Action Within Criminal Justice Act Appointment was sent to Thomas D. Thalken, First Assistant U.S. Attorney, P.O. Box 1228 DTS, Omaha, NE 68101 on this 15th day of December, 1989, by Hand delivery.

Marilyn N. Abbott

REC'D
DEC 15 89
U.S. ATTORNEY
OMAHA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA, Plaintiff, vs. LAWRENCE E. KING, JR. and ALICE PLOCHE KING, Defendants.	)	CR 89-0-63 AUTHORIZATION TO INCUR DEPOSITION EXPENSES UNDER THE CRIMINAL JUSTICE ACT APPOINTMENT

COMES NOW Lawrence E. King, Jr., by and through his Court-appointed attorneys, and moves this Court for prior authorization of deposition expenses in conjunction with the taking of and attendance of various depositions. In support of this Motion, Defendant shows the Court as follows:

1. The Defendant today has filed a Motion with the Court to authorize court-appointed counsel to take the deposition of Robert Kirschner in the civil proceeding captioned National Credit Union Administration Board (NCUAB) v. King, CV88-0-819. Court-appointed counsel has also requested authorization for time spent attending depositions which the NCUAB intends to conduct in the civil proceeding.

2. Defendant requests this Court under the Criminal Justice Act to authorize payment of expenses so that court-appointed counsel may conduct the deposition of Robert Kirschner, including Court Reporter costs and an original and one copy of the deposition.

3. Additionally, counsel for the NCUAB in the civil proceeding has indicated that he will take the deposition of other witnesses in connection with the attorney/client privilege hearing. Court-appointed counsel request that this Court authorize expenses incurred in ordering copies of those depositions taken by the NCUAB in the civil proceeding for the purposes of the attorney/client privilege hearing.

WHEREFORE the Defendant requests an order of this Court authorizing reimbursement of expenses incurred for the taking of the deposition of Robert Kirschner and ordering an original and one copy of that deposition and additionally, copies of such other depositions as may be taken in conjunction with the attorney/client privilege matter.

Respectfully submitted,

LAWRENCE E. KING, JR., Defendant

By Marilyn N. Abbott

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Attorneys for Lawrence E. King, Jr.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the above and foregoing Authorization to Incur Deposition Expenses Under the Criminal Justice Act Appointment was sent to Thomas D. Thalken, First Assistant U.S. Attorney, P.O. Box 1228 DTS, Omaha, NE 68101 on this 15th day of December, 1989, by Hand delivery.

Marilyn N. Abbott

Marilyn N. Abbott

FD-302 (REV. 3-10-82)

FEDERAL BUREAU OF INVESTIGATION

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Date of transcription 12/13/89

[redacted] PRESBYTERIAN CHURCH, Carson, Iowa, was interviewed by Special Agent (SA) [redacted] of the Federal Bureau of Investigation (FBI) and SA [redacted] Internal Revenue Service (IRS). [redacted] was being interviewed regarding FRANKLIN COMMUNITY FEDERAL CREDIT UNION (FCFCU). [redacted] provided the following information:

[redacted] advised he has been [redacted] of the PRESBYTERIAN CHURCH in the Carson, Iowa, area since 1975 upon his graduation from the seminary in Chicago, Illinois. He has had no affiliation with FCFCU. [redacted] advised he has not benefitted financially or could provide any information regarding the allegations involving FCFCU.

[redacted] advised that [redacted] the PRESBYTERIAN CHURCH in Carson, Iowa, he is a member of various committees which meet at the PRESBYTERY OF MISSOURI VALLEY Office located at 44th and Farnam, Omaha, Nebraska. Because of his affiliation with those committees, it is required he attend those committee meetings which meet various times throughout every month, sometimes during the regular working hours and others after the PRESBYTERY has closed. [redacted] advised he does not have a key to the PRESBYTERY in Omaha, Nebraska. [redacted] advised that since the close of the credit union, he has attempted not to attend certain committees because he felt if people wanted to talk about the investigation and the allegations involving FCFCU because of [redacted] being involved in the investigation and FCFCU, he would stay away from those particular committees. Before the investigation and the allegations involving FCFCU, he regularly attended all committees and was at the PRESBYTERY in Omaha, Nebraska, at various times throughout the month. Because his ministry is a small ministry in Iowa, he was required to utilize the xerox machine at the PRESBYTERY in Omaha, Nebraska, because the one available for his use was under constant repair and was inadequate to handle the copying required. Usually his copying was always church related. On one occasion he does recall copying some invitations involving his family. He has never copied anything relating to FCFCU.

Investigation on 12/7/89 at Omaha, Nebraska File # Omaha 147A-571-641

OC

by SA [redacted] Date dictated 12/7/89

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[redacted]

b6
b7C

[redacted] was asked regarding a one foot cubic area located in the floor of the conference room in the basement of the MISSOURI VALLEY PRESBYTERY in Omaha, Nebraska. [redacted] advised he was unaware there was a one foot cubic hole in the floor and could provide no information regarding that empty hole, the contents of the hole, or how the carpet on top of this area was cut. He advised that in the last three months he has not attended a meeting located in conference room and could not provide any information on how the carpet became cut or if there was something within the hole at that time.

[redacted] advised he could not provide any additional information regarding that area or any information regarding FCFCU.

FD-302 (REV. 3-10-82)

FEDERAL BUREAU OF INVESTIGATION

- 1 -

Date of transcription 12/13/89

[redacted] accompanied by her attorney [redacted] was interviewed by Special Agent (SA) [redacted] of the Federal Bureau of Investigation (FBI) and SA [redacted] of the Internal Revenue Service (IRS). [redacted] provided the following information:

b6
b7C

[redacted] advised the one foot cubic hole in the floor of the conference room located in the basement of the MISSOURI VALLEY PRESBYTERY located on 44th and Farnam, Omaha, Nebraska, contains a backwash valve which stops the storm sewer from the Saddle Creek storm sewer basin from backing up within the PRESBYTERY. Sometime in the late 1970s, after considerable damage from the storm sewer backing up within the basement area of the PRESBYTERY, this valve was placed by a plumber at the instruction of [redacted] is now a part time pastor in Decatur, Illinois. After this time, the PRESBYTERY did not experience any further problems from the storm sewer. To gain access to the valve, this hole was left to be serviced. [redacted] advised that to the best of her knowledge, the hole was not to contain a safe which is now located on the first floor by the entrance of the PRESBYTERY. Drawings for the PRESBYTERY are located in her old office on top of the file cabinets located within her office.

[redacted] advised she has not been in the PRESBYTERY since November 1988, and could not provide any further information regarding the recent cutting of carpet over the one foot cubic hole area. [redacted] advised no money was located within this area and could not provide any information why the carpet would have been cut and access to that area would be needed at this time. Since the investigation and the closing of FRANKLIN COMMUNITY FEDERAL CREDIT UNION (FCFCU) in November 1988, she has not been at the PRESBYTERY and had turned her keys in to [redacted] at that time. [redacted] is of the opinion, in 1979 after the bookstore was located in the conference room, new carpet was placed within the area. She is unaware of how the carpet was placed over the hole in the floor and could not provide any information on what supported the floor over the top of the one foot cubic area. [redacted] advised she did not cut the carpet and did not order anyone to cut the carpet, and could not provide any information regarding the recent cutting of the carpet and access to the hole.

Investigation on 12/7/89 at Omaha, Nebraska File # Omaha 147A-571 -612

by SA [redacted] Date dictated 12/7/89

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

NATIONAL CREDIT UNION ADMINISTRATION BOARD, as Liquidating Agent for FRANKLIN COMMUNITY FEDERAL CREDIT UNION,	)	CIV. NO. 88-0-819
Plaintiff,	)	
vs.	)	
LAWRENCE E. KING, JR.,	)	
Defendant.	)	

STATEMENT IN SUPPORT OF
APPEAL FROM MAGISTRATE'S ORDER

Respectfully submitted

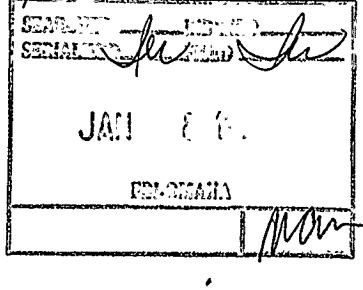
UNITED STATES OF AMERICA,
Intervenor,

By: RONALD D. LAHNERS
United States Attorney

and

And: THOMAS D. THALKEN
First Assistant U.S. Attorney
P.O. Box 1228 - DTS
Omaha, Nebraska 68101
(402) 221-4774

147A-571-643



United States, Intervenor, appeals from the Order of U.S. Magistrate Kopf in this proceeding (Filing No. 176) wherein the U.S. Magistrate granted, in part, a motion by Lawrence E. King, Jr. (King) for a protective order regarding the taking of a deposition of Robert Kirchner (Kirchner) (Filing No. 169).

In this proceeding, the National Credit Union Administration Board (NCUAB) seeks judgment against King on account of his activities involving the failure and closing of the Franklin Community Federal Credit Union (Franklin) resulting in claims being paid from the NCUAB insurance fund in the millions of dollars. In May 1989, the federal grand jury returned an indictment charging King with criminal violations stemming from the collapse of Franklin. That criminal case, United States v. King, et al., CR 89-0-63, is pending before this court and is presently in the pretrial discovery stages.

King's attorneys in the criminal proceeding have been authorized by the court to participate in a limited manner in these civil proceedings under the auspices of the Criminal Justice Act since NCUAB has sought documents being held by King's attorneys. These documents were apparently those of Erickson & Sederstrom (E&S), a law firm previously representing King, and NCUAB seeks disclosure of these documents under a crime-fraud exception under the attorney-client privilege. In order to defend against this challenge, King's attorneys now seek to take the deposition of Kirchner and to insulate the proceedings and transcript of such a deposition from the United

States in the criminal proceeding. Kirchner is an essential witness for the United States in the criminal proceeding. He assisted the grand jury in the reconstruction of the Franklin records after the closing of Franklin and testified before the grand jury as to the results of his reconstruction. Kirchner will be called by the United States during its case-in-chief in the criminal proceedings. King's attorneys have indicated that the planned deposition of Kirchner may be far ranging and that there should be no restrictions on his inquiry under Rule 26(b)(1) of the Federal Rules of Civil Procedure. King's attorneys have indicated that they would not inquire into Kirchner's knowledge of occurrences before the federal grand jury.

The United States has previously opposed King's attorneys being permitted to interject themselves into the civil proceedings under the auspices of the Criminal Justice Act. This position was taken to prevent King's attorney in the criminal proceedings from engaging in discovery in the civil case to which they would not otherwise be entitled to do in the criminal proceedings. See: Rules 15 and 16, Federal Rules of Criminal Procedure. The Magistrate has previously ruled against the United States in that regard. It is of obvious concern to the United States that King's attorneys may be permitted to obtain a tactical and discovery advantage in the criminal proceedings by conducting discovery in the civil proceedings.

This concern is heightened when King's attorneys seek to preclude the United States from any knowledge of the testimony of Kirchner in the pending deposition of Kirchner. King asserts that in questioning Kirchner, his attorneys may reveal King's criminal strategy in the criminal case. Neither the Magistrate nor King have enumerated hypothetical examples of how this revelation will occur or the necessity to reveal criminal defense strategy in taking the deposition of Kirchner on the purported basis for taking the deposition in the civil proceedings. There is no showing that an attorney cannot competently accomplish the taking of the deposition of Kirchner without the disclosure of such defense strategy. On the basis of such potential disclosure of criminal defense strategy, the Magistrate has issued a protective order precluding the United States to have access to the deposition and directing non-disclosure to all participants.

The protective order entered by the Magistrate compromises the ability of the United States to effectively prepare a witness for direct examination in its case-in-chief during the criminal proceedings. Not only is a transcript of the proceedings unavailable to the United States who will be calling the witness Kirchner, but Kirchner is precluded from recounting any of the proceedings of the deposition in the United States' preparation of Kirchner for testimony at the criminal proceeding. Apart from the fact that King could not depose Kirchner

for the criminal proceedings, the United States is precluded from competent witness preparation for the criminal proceedings.

The Magistrate points out that King could, through an investigator or otherwise, contact Kirchner concerning his knowledge of the issues in the criminal proceeding and that such interview would not be producible to the United States before the United States calling the witness at trial. This is true, however, this contact would involve the voluntarily participation by Kirchner and not the compulsory process of a deposition subpoena requiring testimony under oath. Furthermore, even if Kirchner voluntarily provided a statement to the defense prior to the criminal proceedings, he would not be precluded from recounting that statement to the United States during the preparation of the witness for the criminal proceedings. Concomitantly, the United States is without authority to compel any witness to provide testimony after the return of the grand jury indictment and prior to the criminal trial unless the grand jury is continuing to investigate further suspected criminal activity.

Accordingly, the entry of the protective order places the United States at a distinct disadvantage in the criminal proceedings contemplated by the Federal Rules of Criminal Procedure.

The Magistrate has incorrectly stated that the United

States has opposed a stay of discovery in the civil proceedings. The United States has not intervened in the civil proceedings at this juncture for the purpose of either opposing or requesting a stay of the discovery proceedings in the civil case. The United States had stated at the hearing on the intervention motion that it recognized the dilemma of the competing interests in the civil and criminal proceedings and had not interjected itself in the civil proceedings to seek a stay of all discovery proceedings in the civil case. The sole basis for intervention of the United States' motion for intervention was to object to the protective order sought by King in the deposition of Kirchner. While the conduct of discovery proceedings in the civil case have the effect of delaying the criminal proceedings due to the time required by King's attorneys to engage in those proceedings to the exclusion of preparation for the criminal trial and the effect of the utilization of the civil rules of procedure to circumvent the proscriptions regarding discovery in criminal cases, the United States only requested that no protective order be entered regarding Kirchner's deposition. Should the protective order as issued by Magistrate Kopf be sustained by this court, it is the United States' position that discovery proceedings in the civil case have progressed to such a point as to clearly disadvantage the United States and that the stay of discovery requested by King be reconsidered and granted. The United States would seek to

further intervene in the civil proceedings in order to urge a stay of further discovery proceedings in this case.

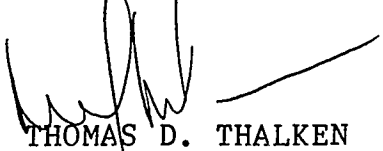
The United States further appeals the Magistrate's order denying the United States the opportunity to intervene in this case when King's attorneys seek to depose other witnesses which will be called by the United States in the criminal proceedings. Absent such grant of intervention, the United States will be unaware of King's efforts to depose witnesses and will be unable to timely object to the manner of taking and preservation of the testimony of such witnesses.

Accordingly, the United States urges the District Court to overrule Magistrate Kopf's order granting Defendant King a protective order in the taking of the Deposition of Kirchner and to further overrule the order denying the United States the opportunity to intervene in the future when King seeks to depose other witnesses that will be called by the United States during the trial of the criminal proceedings. In the alternative, the United States requests the District Court to stay the discovery proceedings in this case until the conclusion of the trial of the criminal case.

Respectfully submitted,

UNITED STATES OF AMERICA,
Intervenor,

By: RONALD D. LAHNERS
United States Attorney



And: THOMAS D. THALKEN
First Assistant U.S. Attorney
P.O. Box 1228-DTS
Omaha, Nebraska 68101
(402) 221-4774

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Statement In Support of Appeal from Magistrate Order has or will be served on the following by handing a copy to them on this 5th day of January, 1990:

Steven E. Achelpohl Marilyn N. Abbott	Attorneys for Lawrence E. King
C. L. Robinson	Attorney for the National Credit Union Administration Board

THOMAS D. THALKEN
First Assistant U.S. Attorney

FILED
DISTRICT OF NEBRASKA
AT ____ M
JAN 4 1990
Norbert H. Ebel, Clerk
By ____ Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,	)	CR 89-0-68
Plaintiff,	)	
vs.	)	O R D E R
LAWRENCE E. KING, JR.,	)	
Defendant.	)	

IT IS ORDERED that for the reasons expressed in the attached memorandum and order in **National Credit Union Administration Board v. King,** CV 88-0-819,[1] the Government's motion (filing 125) for reconsideration is denied.

DATED this 4th day of January.

BY THE COURT:

Richard G. Kopf
UNited States Magistrate

147A-571-644

[1]Attached is **only** the unsealed memorandum and order in the related civil case. The sealed memorandum in the civil case has **not** been attached. If reference to the sealed memorandum is required it may be found at filing 175 in CV 88-0-819, but it shall not be disclosed to the Government or the public except upon court order.

JAN 5 19
FBI-OMAHA

FILED
DISTRICT OF NEBRASKA
AT _____ M
JAN - 4 1990
Norbert H. Ebel, Clerk
By _____ Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

NATIONAL CREDIT UNION ADMINISTRATION BOARD, etc.,	)	CV 88-0-819
Plaintiff,	)	
vs.	)	MEMORANDUM AND ORDER
LAWRENCE E. KING, JR.,	)	
Defendant.	)	

Presented to me in this civil case is the motion for protective order (filing 169) submitted by Lawrence E. King, Jr., the motion for intervention pursuant (filing 170) to Rule 24(b) of the Federal Rules of Civil Procedure submitted by the United States, by and through the United States Attorney for the District of Nebraska (Government), and the motion to quash subpoena duces tecum (filing 173) submitted by the National Credit Union Administration Board (NCUAB). An oral order was entered late in the afternoon on January 2, 1990, and this will serve to confirm the order.

All of these motions raise essentially the same two issues: (1) to what extent should King's court-appointed counsel in a related criminal case, who have been authorized to enter a limited appearance in the civil case, be authorized to probe by way of deposition the knowledge of the expert witness Kirchner, retained in the civil case by the NCUAB and used by the Government before

147A-571-645

DISTRICT OF NEBRASKA
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CLERK

the grand jury, and who is likely to appear in the criminal case as a Government witness, regarding the actions of King and the Franklin Community Federal Credit Union (Franklin) and related entities as those actions might bear upon the crime-fraud exception to the attorney-client privilege regarding the so-called Erickson & Sederstrom documents, when the NCUAB seeks to pierce King's attorney-client privilege in the civil case; and (2) to what extent should the Government be precluded from participating in the civil deposition of Kirchner, or otherwise be prohibited from receiving information about the civil deposition of Kirchner.

There is no time to write an expansive memorandum. The deposition of Kirchner was scheduled for the day after these motions were called up for hearing. At the request of the parties, I have previously scheduled January 15, 1990 (a holiday) to take evidence on the issue of NCUAB's claim that the Erickson & Sederstrom documents are not protected by King's attorney-client privilege. The NCUAB tells me that time is of the essence and does not desire anything which will postpone resolution of the underlying question of whether the NCUAB is entitled to examine the so-called Erickson & Sederstrom documents. I further understand that the Government intends to seek immediate review of my order. With the foregoing caveat in mind, I now turn to the two main issues.

I. RELEVANCE UNDER RULE 26

Let us be clear about what the principal legal issue is in terms of the extent to which King is entitled in the civil case to obtain discovery. The issue is framed by simply asking whether King seeks relevant evidence or evidence which will reasonably lead to the discovery of admissable evidence under Federal Rule of Civil Procedure 26(b)(1). If King seeks such evidence then he is entitled to it, unless one or more of the factors outlined in Federal Rule of Civil Procedure 26(b)(3), (b)(4) or (c) are shown to exist.[1] Parenthetically, I specifically now find in this civil case, and have found in the criminal case, that the attorney-client privilege issue is so important to the **criminal** case that King's court-appointed lawyers must be authorized to challenge the

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[1]The advisability of entering a protective order is discussed in the next section of this memorandum. Discovery regarding Kirchner would not violate Federal Rule of Criminal Procedure 26(b)(3) or (4) since the progression order (filing 86) entered in this case allows depositions of trial experts and Kirchner is a trial expert endorsed by the NCUAB (filing 149). Moreover, the protective order which I will enter, and which is discussed later in this memorandum, will provide a method for the NCUAB to raise attorney-client privilege or work-produce doctrine claims as to the subpoena duces tecum respecting documents. The NCUAB further advised me that, although it made an objection about the lack of sufficient notice of the deposition, it would not stand on this objection if to do so would only further delay the deposition.

issue in the civil case in order to adequately defend King in the criminal case.[2]

King is being forced to defend, in the civil case, against a claim by the NCUAB that the NCUAB should be permitted to examine documents previously in the hands of King's lawyers, many of which probably would otherwise be subject to the attorney client-privilege, but for the contention of the NCUAB that "[a]s early as 1985" King "[b]y retaining counsel [Erickson & Sederstrom] to mollify, divert or stall the discovery attempts of the IRS while continuing his ongoing embezzlements ... was using the services of his attorneys to continue what he knew to be crime and a fraud." NCUAB's Brief In Support of Motion to Compel Answers to Interrogatories and Production of Documents [hereinafter NCUAB's Brief in Support] at 5. Without any shadow of a doubt a person very knowledgeable about King's activities "while continuing [King's] ongoing embezzlements" is the deponent Kirchner. Kirchner was the head man hired by the NCUAB to audit Franklin upon the institution being closed. For example, in the plaintiff's notice

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[2]The attorney-client privilege issue is just one of a number of issues which I must resolve in order to fully determine the NCUAB's motion to compel (filing 141) and King's motion for protective order (filing 137). I have previously ruled in part generally in favor of King on the self-incrimination claim, reserving for further ruling matters such as the attorney-client privilege claim and the contention that the privilege was pierced by the crime-fraud exception (filing 159).

of designation of expert witnesses (filing 149), Kirchner and another man, John Queen, are listed as experts because, due to the "results of their exhaustive examination of, and reconstruction of, the books and records of" Franklin, they had specific testimony to give about the "amounts of money misappropriated by or at the direction of the defendant" King. (Filing 149).

There is thus no doubt that Kirchner is subject to deposition in the sense that he has relevant testimony under Rule 26 about the predicate to the "crime/fraud" argument advanced by the NCUAB. Just how do Kirchner and the NCUAB know that King was stealing from Franklin? After all, the crime or fraud claimed by NCUAB is the "stall" of the IRS "to continue what [King] knew to be crime and a fraud," to wit, "his ongoing embezzlements." NCUAB's Brief in Support at 5. If the NCUAB cannot establish that King was stealing from Franklin at the time he consulted with Erickson & Sederstrom the NCUAB's attempt to pierce the attorney-client privilege fails. One cannot assume for obvious reasons that the NCUAB's claim is true. King has the right to discover the basis of the NCUAB claim in order to defend the attorney-client privilege.

II. A PROTECTIVE ORDER FOR THE GOVERNMENT AND KING

The Government, understandably, does not want King to obtain a discovery advantage in the criminal case. For all practical purposes King could never depose Kirchner in the criminal case,

even though it is admitted by the Government that Kirchner will be an important witness for the Government at trial in the criminal case and even though it is admitted that Kirchner appeared before the grand jury considering the King indictment. Fed. R. Crim. P. 15. King would probably never get Kirchner's statements before the grand jury or otherwise until Kirchner testifies at trial, Fed. R. Crim. P. 16(a)(2), but once Kirchner testified as a Government witness King would be entitled to the statements. Fed. R. Crim. P. 26.2(a); 18 U.S.C. § 3500 (the Jencks Act).

On the other hand, King's lawyers do not want the Government to participate in the deposition of Kirchner or see a copy of the deposition of Kirchner because they argue that they will of necessity disclose criminal trial strategy by asking questions of Kirchner. It must be remembered that the Government would not be entitled to statements obtained from Kirchner by King's lawyers under the criminal rules,[3] Fed. R. Crim. P. 16(b)(2), unless and until Kirchner testified on direct examination as a witness called by King. Fed. R. Crim. P. 26.2(a). There is no doubt that counsel appointed in the criminal case has expended significant effort preparing to question Kirchner in the criminal case at the time of

[3]There is nothing to stop King in the criminal case from taking the recorded statement of Kirchner, e.g., through the use of an investigator, assuming Kirchner would talk to the investigator.

trial.[4] King's court-appointed counsel are fearful that if the Government's counsel sees the questions being asked of Kirchner in advance of trial of the criminal case the delicate balance of the Federal Rules of Criminal Procedure will be disrupted.

The easy answer to this problem would be to stay discovery related to the motion of the NCUAB to compel King to produce the Erickson & Sederstrom documents. Judge Cambridge has previously refused to stay this case. Both the Government and the NCUAB argue that discovery should not be stayed. King has filed a motion for a stay of discovery.

This case is odd in that normally the Government moves for a stay of discovery in order to protect its criminal prosecution where the civil discovery is intended to give a criminal defendant broader discovery than contemplated by the criminal rules. 4 J. Moore, J. Lucas, & G. Grotheer, Jr., **Moore's Federal Practice**, ¶ 26.70[2], at 464 & n.15 (2d ed. 1989) [hereinafter 4 J. Moore] (citing **SEC v. Control Metals Corp.**, 57 F.R.D. 56 (S.D.N.Y. 1972)).

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[4]I have filed with this memorandum and order a copy of a sealed memorandum and order setting forth the efforts of King's lawyers to prepare to meet the testimony of Kirchner. This information is derived from previous **ex parte in camera** hearings held by me in the criminal case regarding Criminal Justice Act matters. King offered to make a similar **ex parte in camera** showing in the civil case, with counsel for the NCUAB present, but excluding Government's counsel. Counsel for the NCUAB declined the offer. I then informed the parties of my intentions in this regard, and I heard no specific objection.

I have found no case where the Government, as a nonparty, intervened, opposed a stay of discovery, and yet took the position that a civil defendant, who was also a criminal defendant, was not entitled to a protective order to shield the defendant's criminal trial strategy from disclosure.

Staying discovery on the NCUAB's motion would likely have the impact of staying consideration of the motion to compel, which in turn would likely have the result of delaying trial. Certainly King could not be asked to defend the motion to compel without discovery since resolution of the crime-fraud exception is fact-intensive. Moreover, staying consideration of the motion to compel may irreparably injure the NCUAB, as the NCUAB tells me that it needs a resolution of the motion to compel prior to trial and that time constraints, including statute of limitation and malpractice liability coverage matters, may preclude the NCUAB from seeking judgment against others unless the NCUAB proceeds rapidly. Under the circumstances, and especially given Judge Cambridge's initial refusal to stay this case, the "easy answer" should not be adopted.

This then leads to me to the question of how the court can balance the interests of all the parties short of staying discovery. Assume for a moment that the civil case against King did not exist and that King could not depose Kirchner, but further assume that King took Kirchner's statement without Government's

counsel being present, e.g., through the use of an investigator. Under those circumstances, the Government could withhold production of the grand jury transcripts of Kirchner's testimony and any other statements Kirchner gave the Government until Kirchner completed his direct testimony as a Government witness,[5] Fed. R. Crim. P. 16(a)(2) & 26.2(a); 18 U.S.C. § 3500, but King would not be required to give up statements obtained from Kirchner unless King called Kirchner as a witness. Fed. R. Crim. P. 16(b)(2) & 26.2(a). This is essentially the situation in which the Government and King would be if I entered the protective order suggested by King, with one distinction.

The fundamental difference between the example given above and what is proposed by King is that I would be permitting a deposition of Kirchner without the attendance of the Government's lawyer and without the Government being aware of that about which Kirchner testifies. I do not think that this difference overcomes King's legitimate right to obtain discovery in the civil case to defend an important attorney-client privilege claim which may also have significance in the criminal case, without giving up his right to

[5]I assume for the moment that there is no constitutional issue which requires earlier production by the Government, and that there has been no order under Federal Rule of Criminal Procedure 6(e)(3)(C) for earlier production.

keep his trial strategy in the criminal case secret. I come to this conclusion for the following reasons.

The Government has had Kirchner's testimony before the grand jury, and neither King nor his counsel could participate in that examination. Moreover, King and his counsel, at least at this juncture, will not have access to Kirchner's statements to the Government in the criminal case until Kirchner testifies at trial. Therefore, it does not unfairly disadvantage the Government in the criminal case to put King in essentially the same position as the Government is in, given the fact that King has **no choice** but to defend the civil case.

The Government raises essentially three arguments[6] to this analysis: (1) the deposition of Kirchner violates the spirit of the Federal Rules of Criminal Procedure because discovery depositions are not allowed in criminal cases; (2) if the protective order proposed by King were implemented the Government could not even see the deposition when King endeavored to impeach Kirchner at the time of trial in the criminal case; and (3) unless the Government attends Kirchner's deposition it cannot protect the secrecy of the

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[6]Because of the expedited manner in which this matter was presented to me I did not receive briefs from any of the participants. Thus, I understand the positions of the parties through their statements.

grand jury from being invaded. I find none of these arguments persuasive.

As to the spirit of the Federal Rules of Criminal Procedure, while it is true that the rules do not contemplate discovery depositions, King seeks the deposition in this civil case, where discovery depositions are common, because he has no choice[7] but to defend himself and a privilege central to the defense of both the criminal and civil cases. Certainly the **spirit** of the criminal rules would not be fostered by allowing the Government to have early access to King's criminal strategy because the Government and the NCUAB in the civil case oppose a stay of discovery in the civil case. If there must be an accommodation the balance should be struck in a manner which does not unduly disadvantage either party.

As to the impeachment question, King's lawyers agreed that the proposed protective order could be modified to allow Government counsel to have access to the civil deposition as soon as Kirchner's direct testimony is adduced by the Government in the

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[7]The NCUAB contemplated withdrawing Kirchner as a witness regarding the motion to compel. This would not obviate the problem. Neither the NCUAB nor the Government has the right to orchestrate from whom King seeks relevant evidence under Federal Rule of Civil Procedure 26. This is particularly true where, as is the case here, Kirchner is the most knowledgeable witness available.

criminal case. This concession obviates the Government's concern about unfair impeachment.

Finally, the absence of Government counsel at a deposition does not endanger the secrecy of the grand jury. I shall enter a protective order prohibiting King's lawyers from asking questions which would invade grand jury secrecy by in essence producing a grand jury transcript, such as by asking the witness to testify about what was literally asked of the witness at the grand jury.[8] But the simple fact that a witness testified before a grand jury has never precluded defense counsel and the witness from discussing facts relevant to the case which the grand jury handed up. As the United States Court of Appeals for the Third Circuit has stated, Federal Rule of Criminal Procedure 6(e) is designed to protect against disclosure of "only the essence of what takes place in the grand jury room." **In Re Grand Jury Investigation**, 630 F.2d 996, 1000 (3d Cir. 1980), **cert. denied**, 449 U.S. 1081 (1981). Indeed, the Rule provides that "[n]o obligation of secrecy may be imposed on any person except in accordance with this rule." Fed. R. Crim. P. 6(e)(2). And the Notes of Advisory Committee on Rules

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[8]Of course, King could, for civil purposes, seek discovery of the grand jury transcripts pertaining to Kirchner pursuant to Federal Rule of Criminal Procedure 6(e)(3)(C)(i), and under certain circumstances he would be entitled to such discovery for the defense of the civil case whether or not the Government was a party. 4 J. Moore, **supra**, ¶ 26.61[5.--1] & 26.61[6.--3]. King makes no such request here.

explicitly state: "[t]he rule does not impose any obligation of secrecy on witnesses." Fed. R. Crim. P. 6(e) advisory committee's note. I do not understand that King's lawyers intend to ask questions which will require Kirchner to attempt to recount what he literally saw, literally heard or literally said before the grand jury; rather, I understand that King's lawyers want to depose Kirchner about facts which are relevant to the crime-fraud exception to the attorney-client privilege. As a consequence, the Government's concerns are not justified.[9]

It is with the foregoing in my mind that I entered the following order which I now confirm.

IT IS ORDERED:

1. The Government's motion for intervention (filing 170) is granted to the limited extent that the Government may contest the taking of the deposition of Kirchner and matters related directly thereto, and is otherwise denied;

2. The NCUAB's motion to quash (filing 173) is denied, except that the NCUAB may withhold from production documents

---

[9]It is also important that Kirchner's work has been widely reported in the press. Indeed, his interim report is a matter of public record. One wonders what is left of the secrecy of Kirchner's testimony before the grand jury. When I asked Government's counsel about this I did not receive a convincing response; however, because this might become an issue in the criminal case under Federal Rule of Criminal Procedure 6(e) I make no finding in this regard since the issue was not clearly framed when I inquired of Government's counsel.

claimed exempt from production upon the claim of an attorney-client privilege or work-product claim, but if a document is withheld then within ten (10) days of the date for production the NCUAB shall state a description of the document withheld with as much specificity as is practicable without disclosing its contents, including: the general nature of the document; the identity and position of its author; the date it was written; the identity and position of its addressee; the identities and positions of all persons who where given or have received copies of it and the identity and position of the custodian; and, the specific reason or reasons why it was withheld from production. Whereupon King may file a motion to compel;

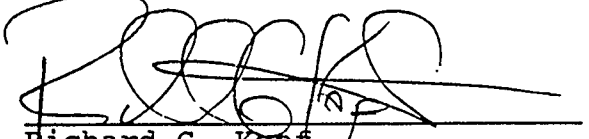
3. King's motion for a protective order (filing 169) is granted as provided herein, but is otherwise denied, to wit: (a) the deposition of Kirchner (deposition) shall be conducted with no persons present other than attorneys for the parties (excluding the Government), the witness's personal attorney, and the court reporter; (b) all persons present at the deposition are ordered not to reveal the contents of the deposition to any person not present at the deposition, including but not limited to the United States Attorney for the District of Nebraska; (c) upon completion of the deposition, the deposition transcript is ordered sealed; (d) if the witness does not waive the reading and signing of the deposition,

the witness shall not copy or reveal the contents of the deposition during the reading and signing; (e) any copies of the deposition shall be given only to the attorneys for the parties (excluding the Government) to this action, and then the copies shall be held in a secure place; (f) the original deposition and copies shall remain sealed until further order of the court, except as provided in subparagraph (g); (g) King's court-appointed counsel shall provide a copy of the deposition to counsel for the Government, upon request, immediately after Kirchner completes his direct testimony adduced by the Government in the criminal case; (h) the defendant King shall not during the deposition inquire about what Kirchner literally and actually saw, heard or said when appearing before the grand jury; (i) the defendant King shall limit all inquires at the deposition to matters which are relevant or which may lead to the discovery of admissible evidence regarding the crime-fraud exception to the attorney-client privilege claim relating to the "Erickson & Sederstrom" documents; (j) if necessary, the undersigned magistrate will be available by telephone or in person to rule upon the propriety of specific questions;

4. For purposes of appeal, the undersigned considers this order a final order, and this order shall be stayed until the close of business on Friday, January 5, 1990.

DATED this 4th day of January, 1990.

BY THE COURT:



Richard G. Kopf
United States Magistrate

OM 147A-571
DDM:ses

The following investigation was conducted by Special Agent [redacted] at Omaha, Nebraska, on December 13, 1989: b6 b7C

[redacted] stated on December 9, 1989, the Benedict Club in Omaha, Nebraska, had a fund raiser for Christmas gifts for underprivileged black children. Source stated the Benedict Club is a club made up of prominent black individuals in the metropolitan Omaha area. Source stated [redacted], also known as (aka) [redacted] a black male, approximately [redacted] years old, 6'4", 280 pounds, a known pimp from Las Vegas, Nevada, was with [redacted] at the fund raiser at the Benedict Club. Source stated [redacted] and [redacted] were together throughout the majority of the evening at the fund raiser. Source stated that [redacted] had a Mark X Continental with license plates registered to a rental agency, and he wore an overcoat with a mink collar, a large diamond pin, and several diamond rings on his hand. Source stated [redacted] showed up with a full length mink coat on at the fund raiser.

Source stated that [redacted] bought several rounds of drinks and is believed to have made a donation at the fund raiser. Source stated that [redacted] made his presence known and socialized with most of the black leaders in the metropolitan Omaha area.

147A-571-64
JAN
FBI-OMAHA

UNITED STATES DISTRICT COURT

DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA, Plaintiff,	)	Case Number; CR89-0-63
vs.	)	MOTION FOR INSPECTION PURSUANT TO F.R. CRIM. P. 16
ALICE PLOCHE KING, Defendant.	)	

FBI COPY

COMES NOW the defendant, Alice Ploche King, by and through her attorney, Jerold V. Fennell, and hereby moves this Court for an Order requiring the Government to produce videotaped testimony in the Government's possession. Pursuant to F.R. Crim. P. 16, defendant respectfully requests for inspection the approximate 21 hours of videotaped testimony given to the Government by representatives of the State of Nebraska Legislative Committee investigating Franklin Credit Union.

Defendant will abide by any order of the Court regarding disclosure of information received and respectfully prays the Court to grant this motion.

DATED this 10th day of January, 1990.

Jerold V. Fennell

Jerold V. Fennell #11266
Suite 270 Regency Court
120 Regency Parkway
Omaha, Ne 68114
(402) 393-1286
Attorney for Defendant

REC'D
JAN 10 90
U.S. ATTORNEY
OMAHA

147A-571-647

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has personally served copies of the Defendant's Motion for Additional Disclosure and supporting documents on the following: Steven E. Achelpohl

JAN 11

of 100 Historic Library Plaza, 1823 Harney Street, Omaha, Nebraska 68102 and Assistant U.S. Attorney Thomas D. Thalken, Federal Building, Omaha, Nebraska 68102 on the 10th day of January, 1990.

Edith J. Pullen

UNITED STATES DISTRICT COURT

DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA, Plaintiff, vs. ALICE PLOCHE KING, Defendant.	)	Case Number: CR89-0-63 MEMORANDUM IN SUPPORT OF A MOTION FOR ADDITIONAL DISCLOSURE

STATEMENT OF CASE:

Alice Ploche King, Defendant, faces a 12 count indictment in a complex criminal case. Count 1 of the indictment carries with it a punishment dictated by the full breath of the conspiracy allegation and could, therefore, result in a sentence based on a loss of $39,000,000.00 from Franklin Community Credit Union.

In order to resolve whether the Defendant willfully, unlawfully, or knowingly conspired in the alleged crime, it is necessary that the Government disclose testimony that describes events occurring during the dates alleged in Count 1. The video taped testimony describing expenditures of substantial sums of money by Franklin Credit Union personnel is needed by Defendant to prepare an adequate defense. Such information could result in exculpation of Defendant or sentence reduction and must therefore be disclosed.

STANDARDS OF REVIEW:

THE REQUESTED TESTIMONY IS MATERIAL TO GUILT OR PUNISHMENT AND THEREFORE BRADY DEMANDS DISCLOSURE.

The suppression by the prosecution of evidence favorable to and requested by an accused violates the due process clause of the 14th Amendment, irrespective of the good faith of the prosecution, where the evidence is material either to guilt or punishment. Brady v. Maryland, 373 U.S. at 87, 83 S. Ct. 1194 (1963). The test of materiality is whether the requested evidence would tend to exculpate Defendant, or reduce Defendant's penalty period.

The testimony requested could exculpate Defendant from Count 1 of the indictment by proving a lack of knowledge in the alleged conspiracy or, alternatively, could reduce Defendant's punishment under the Federal Sentencing Guidelines. Thus disclosure under Brady is demanded.

THE TESTIMONY IS MATERIAL UNDER BRADY'S PROGENY AND THEREFORE DISCLOSURE IS REQUIRED.

In United States vs. Agurs, 427 U.S. 97, 96 S. Ct. 2392 (1976), the Supreme Court held that, under the due process clause of the Fifth Amendment for federal criminal trials, a prosecutor has a constitutional duty to volunteer exculpatory material to the defendant, if the admission of such evidence would create a reasonable doubt as to the guilt of the accused. Id, 427 U.S. at 112. The Agurs Court restricted Brady to evidence that might have affected the outcome of the trial. But, the Court observed Brady's application unrestricted, in cases where the Defendant has made a pretrial request for specific evidence:

> When the prosecutor receives the specific and relevant request, the failure to make any response is seldom, if ever, excusable.

Id, 427 U.S. at 106.

The Defendant should not have to satisfy the severe burden of demonstrating that newly discovered evidence probably would result in acquittal. Id, 427 U.S. at 111.

Agurs encourages a pretrial decision by the prosecutor as opposed to a post-trial decision by the Judge and therefore the evidence requested should be disclosed on the grounds that it meets Brady as Defendant made a specific request.

In United States vs. Bagley, 473 U.S. 667, 105 S. Ct. 3375 (1985), Justice Marshall's dissent addresses the cruciality of disclosure to the reliability of the verdict:

> When the State does not disclose information in its possession that might reasonably be considered favorable to the defense, it precludes the trier of fact from gaining access to such information and undermines the reliability of the verdict.

Id, 473 U.S. at 693.

The majority remanded Bagley to the Court of Appeals to determine if a reasonable probability existed of a different trial outcome, if compensation agreements for key witnesses had been disclosed at trial. Id, 473 U.S. at 684.

Justice Marshall stated the majority's analysis incorrectly focused on a prosecutorial determination of the likelihood that particular information would affect the outcome at trial. Id, 473 U.S. at 702. Under the better standard, Brady, he reasserted the duty of the prosecutor to disclose all favorable evidence to the Defendant's case. Id, 473 U.S. at 702.

Justice Marshall recognized the existence of any evidence favorable to the defense may create just the doubt that prevents a guilty verdict. Id, 473 U.S. at 693.

Defendant believes the mere fact that the FBI, the Omaha Police Department and investigators hired by the Nebraska Unicameral Committee, have labored over two years investigating the activities described in the taped testimony, confirms the importance of the videotapes now in the Government's possession.

In United States vs. Anderson, 788 F.2d 517 (8th Cir. 1986), the District Court of Minnesota denied Defendant's request for investigation tapes of conversations involving a Government witness. The Government refused to produce the tapes because they were long and purportedly unrelated to Defendant's case. The District Court held the Defendant failed to show materiality.

The 8th Circuit remanded the case to the District Court and stated that the Court had not fully discharged the duty imposed upon it by Brady and directed the District Court to review in camera the tapes, Id, at 519.

The Anderson Court cites Brady as the standard that must be met regarding disclosure. Anderson requires possible exculpatory evidence to be disclosed or determined immaterial by the Court.

CONCLUSION:

Based on the foregoing facts and authority, the Motion for Additional Disclosure should be granted.

Dated this 10th day of January, 1990.

Jerold V. Fennell #11266
Suite 270 Regency Court
120 Regency Parkway
Omaha, NE 68114
(402) 393-1286

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has personally served copies of the Defendant's Motion for Additional Disclosure and supporting documents on the following: Steven E. Achelpohl of 100 Historic Library Plaza, 1823 Harney Street, Omaha, Nebraska 68102 and Assistant U.S. Attorney Thomas D. Thalken, Federal Building, Omaha, Nebraska 68102 on the 10th day of January, 1990.

Edith J Parker

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

NATIONAL CREDIT UNION ADMINISTRATION BOARD, as Liquidating Agent for FRANKLIN COMMUNITY FEDERAL CREDIT UNION, Plaintiff, vs. LAWRENCE E. KING, JR., Defendant.	CIV. NO. 88-O-819

PLAINTIFF'S BRIEF ON MOTION FOR STAY AND APPEALS FROM THE MAGISTRATE'S ORDER OF JANUARY 4, 1990

FBI
COPY

Submitted By:

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PART I.

A

A STAY WOULD VIOLATE FEDERAL STATUTES WHICH FORBID THE COURT TO "RESTRAIN OR AFFECT THE EXERCISE OF POWERS OR FUNCTIONS OF A LIQUIDATING AGENT." 12 U.S.C. § 1787(a)(1)(B).

The important work of the National Credit Union Administration has been brought to a standstill in clear violation of federal law.

Federal statutes mandate that an insolvent federal credit union be liquidated by NCUAB as liquidating agent. 12 U.S.C. § 1787(a)(1)(A). Subparagraph B of that statute provides that the credit union may ask the district court to prohibit the liquidation, and then provides:

> "Except as otherwise provided in this subparagraph, no court may take any action for or toward the removal of any liquidating agent or, except at the instance of the Board, restrain or affect the exercise of powers or functions of a liquidating agent." (Emphasis added).

The entry of a stay of discovery would violate this section since it would "restrain or affect the exercise of the powers or functions of a liquidating agent."

12 U.S.C. § 1787(j) provides:

> **"(j) Power of Board respecting liquidations subject to regulation of Board of public authority**
>
> In connection with the liquidation of any insured credit union, the Board shall have the power to carry on the business of and collect all obligations to the credit union, to settle, compromise, or release claims in favor of or against the credit union, and to do all other things that may be necessary in connection therewith, subject only to the regulation of the Board, or, in cases where the Board has been appointed liquidating agent solely by a public authority having jurisdiction over the matter

> other than said Board, subject only to the regulation of such public authority." (Emphasis added).

The Supreme Court has said in Coit Independence Joint v. Federal Savings & Loan Insurance Corp., 489 U.S. _____, 109 S.Ct. 1361, 103 L.Ed.2d 602 (March 21, 1989) nearly identical language in the F.S.L.I.C. Statutes:

> ". . . prohibits untimely challenges to the receiver's appointment or collateral attacks attempting to restrain the receiver from carrying out its basic functions."

The primary function of the liquidating agent is to discover the assets of the Credit Union including obligations due to the Credit Union. The use of discovery proceedings is critical to that function since they are necessary to the full presentation of the civil case against Mr. King. In addition, however, the discovery will almost certainly reveal other assets or other individuals or entities liable to the Credit Union.

Notwithstanding, the NCUA has been blocked on all fronts from the important work which Congress has entrusted to it. It has been prevented from gathering documents owned by the Credit Union in possession of the former lawyers for the Credit Union. It has been prohibited from gathering the records of the Consumer Services Organization held by those lawyers. It has been prevented from securing funds belonging to CSO in the hands of Harold Anderson. It has been prevented from enforcing a default against CSO. It has been forced to stand by and watch the dissipation of important assets. Unable to obtain judgment against CSO, it is nevertheless forced to pay the expense of full-time security and utilities on the building. The assets of Mr. King under attachment are rapidly being consumed by storage and receiver expenses.

Frankly, we believe the court has an obligation to allow the liquidating agent to do its job. That is what the statute says and that is what it means.

Mr. King has rights to be protected, but those rights are not unlimited and they are clearly defined by law. The court, particularly the Magistrate, has gone beyond those rights. It seems to have created an unspoken rule that the wishes of Mr. King take priority over all other considerations. There is no legal basis for that priority. Entirely to the contrary, the statute prohibits the court from interfering with the work of the liquidating agent. In any instance in which its work does not interfere with a defined legal right of Mr. King, we submit the liquidating agent is entitled by federal law to proceed with its work without interference.

We believe that the effect of the statute, 12 U.S.C. § 1787(a)(1)(B), is to obligate the court to accommodate the interests of the liquidating agent and the public which it represents, as well as the legal rights of Mr. King. That balance should not be difficult to achieve and the NCUAB has bent over backwards to reach such an accommodation. Mr. King's counsel, in contrast, have concentrated on manipulating toward a stay of the NCUAB's statutory duties. Rather than attempt a compromise, his counsel have claimed exaggerated rights for Mr. King and have postured the potential of prejudice far beyond any reasonable possibility.

By asking this court to stay these discovery proceedings, Mr. King's criminal counsel are squarely asking the court to "restrain" the exercise of powers of the liquidating agent. If it succeeds, it will impair the ability of the liquidating agent to recover in these proceedings and to make timely discovery of other assets and individuals or entities which may be liable to the Credit Union as well as the Kings themselves.

B.

THE STAY SHOULD BE DENIED:

A. OTHER CREDITORS OF MR. KING ARE PURSUING CLAIMS TO JUDGMENT AND PLAINTIFF CANNOT BE GUARANTEED PRIORITY.

B. AMERICAN EXPRESS HAS OBTAINED A JUDGMENT FOR $109,974.68 BY DEFAULT WHILE THE LIQUIDATING AGENT HAS NOT BEEN ALLOWED TO GO FORWARD.

C. THE PUBLIC INTEREST REQUIRES THAT THE CREDITORS OF THE CREDIT UNION AND THE INSURANCE FUND BE REIMBURSED AS SOON AS POSSIBLE. LARGE AMOUNTS OF MONEY ARE UNACCOUNTED FOR.

D. THERE IS NO PROBABILITY MR. KING CAN SUCCEED ON THE MERITS.

E. THE RIGHT OF THE VICTIMS TO RECOVER SHOULD BE AT LEAST EQUAL TO THE RIGHT OF THE THIEF.

The National Credit Union Administration Board (NCUA) is the plaintiff in this civil suit for damages of $39,344,971.61. NCUA has submitted a Motion for Summary Judgment to which the defendant has countered with a Motion to Stay until final resolution of criminal proceedings against Mr. King, in United States v. King, CR 89-O-63.

We think the following points need to be made with respect to the defendant's Motion for Stay in this case:

1. The case law indicates that the single most important factor to consider is the probability that the defendant will ultimately prevail on the merits in the civil case. Here, there is virtually no chance that the defendant will prevail. In his depositions he admitted the personal nature of expenditures totalling $752,291.53. To a certainty, those payments were from Credit Union funds. (Vopat Depo., Kirchner Aff.). Similar payments to the identical payees bring the actual total to $10,974,064.78. (Dunne Aff.). All this is in evidence on the

plaintiff's Motion for Summary Judgment. That evidence is hereby submitted in resistance to this Motion to Stay.

2. Mr. King admits to participating in the falsification of documents and, indeed, his only defense was that he believed he was spending personal funds from unknown sources which he, by intention and calculation, did not cause to be reflected on any records of the Credit Union. (Filing 141, Exh. 11).

3. Plaintiff had filed its Motion for Summary Judgment in June 1989 prior to the Motion for Stay and believes that when the Court ultimately considers the Motion for Summary Judgment, it will conclude that there is no genuine issue of material fact and that plaintiff is entitled to a summary judgment as a matter of law.

4. It is not in the public interests that the civil proceedings be delayed. These are proceedings by an agency of the United States government acting as liquidating agent for the defrauded Credit Union, which stands in the shoes of the hundreds of depositors and other creditors of the Credit Union who were demonstrably defrauded by Mr. King's activities. The purpose of the suit is to recover funds to the liquidating estate of the defrauded Credit Union so that the insurance fund and creditors of the Credit Union can be reimbursed to the maximum extent possible. It is very much in the public interest that those funds be reimbursed as soon as possible.

5. Other claimants are filing suits against Mr. King and obtaining judgments. In particular, American Express obtained a judgment on December 6, 1989 in the District Court of Douglas County, Nebraska, Docket 877, Page 785, in the amount of $109,974.68 (copy attached). While plaintiff has an attachment lien with respect to certain property of Mr. King and a receiver has been appointed with respect to the remainder, plaintiff will be forced to litigate attempts by other creditors to assert their judgments and there can be no assurance that plaintiff will succeed without having reduced its claim to judgment.

6. Very substantial insurance, storage, attorney fees and other costs are being incurred by the receiver, which ultimately will be paid from funds to which the plaintiff NCUA and the insurance fund would otherwise be entitled.

7. Very large sums of money are as yet unaccounted for. The records being sought are the last large group of records which NCUA has been prevented from receiving, even though they include records of the Credit Union and CSO themselves, and even though they are to a certainty not privileged.

It is imperative that the liquidating agent be allowed to discover recoverable assets as soon as possible. Those assets include not only the proceeds of the embezzlements, but also the existence of liability on the part of other persons who participated in the embezzlements, either knowingly or unknowingly. Those liabilities specifically include accountants and attorneys who unquestionably participated in transactions by which funds were stolen. If the liquidating agent is halted in its investigation, those claims and proceeds may be lost forever. All of the documents which we have sought in the possession of Mr. King are unquestionably relevant and helpful in the assertion of the claim against Mr. King and are proper subjects of discovery under Rule 26. Of equal importance however, they may very well make possible the location of other avenues of recovery for the insurance fund.

C.

THE LAW

The United States Constitution, of course, does not require a stay of civil proceedings pending the outcome of related criminal proceedings, nor does any statute or case law. Securities and Exchange Commission v. Dresser Indus., 628 F.2d 1368, 1375 (D.C. Cir.) cert. denied, 449 U.S. 993, 101 S.Ct. 529, 66 L.Ed.2d 289 (1980) (Stay of civil action pending outcome of grand jury investigation denied.); Golden Ice Cream Co. v.

Deerfield Specialty, 87 F.R.D. 53, 55 (Defendant's Motion to Stay Civil Proceedings until criminal antitrust proceedings was denied.) (1980). In Deerfield Specialty, the Court found:

> "[N]o basis in the law for the notion that defendants in a criminal prosecution, . . ., have a due process right to stay proceedings in related civil action, lest they be forced to defend themselves on two legal fronts simultaneously."

Id. at 55.

Courts have employed a variety of factors for determining whether to grant a blanket stay of civil proceedings. See, Deerfield Speciality, supra, (Five-fold test); S.E.C. v. Grossman, 121 F.R.D. 207, 209-10 (Motion stay denied, balancing of competing interests test applied); Afro-Lecon, Inc. v. United States, 820 F.2d 1198, 1202 (Court urged a case-by-case assessment and granted stay where prosecution was malicious). The test cited in defendant's Motion includes the essential elements necessary to make this determination. That test, enunciated in Guirola-Beeche v. U.S. Department of Justice, 662 F.Supp. 1414; 1417 (S.D.Fla. 1987), asks the court to look to:

> "1) the likelihood of the moving party ultimately prevailing on the merits; 2) the extent the moving party would be irreparably harmed; 3) potential for harm to the opposing party if the stay is issued and 4) whether issuing a stay would be in the public interest. Generally speaking, the first factor is the most important." (Emphasis supplied.)

The fact that Mr. King will not ultimately prevail should weigh heavily in the Court's consideration of whether to grant the stay since in Guirola-Beeche the court stated that this first consideration is the most important of the four factors. Guirola-Beeche, supra, at 1417.

Defendant has in the past contended that he would be irreparably harmed if this stay is not granted, but could not

cite a single case demonstrating what irreparable harm is. The defendant also asserted that the complexity of the civil litigation and the media attention given this case would make it impossible to vigorously defend both the civil and criminal cases simultaneously. The court in Arden Way Associates v. Boesky, 660 F.Supp. 1494 (S.D.N.Y. 1987), found neither of these arguments persuasive, and denied the defendant's Motion for a stay.

> "In weighing these factors the courts are mindful that a policy of issuing stays 'solely because a litigant is defending simultaneous multiple suits would threaten to become a constant source of delay and an interference with judicial administration.' Paine, Webber, 486 F.Supp. at 1119. Thus, '[a]bsent a showing of undue prejudice upon defendant or interference with his constitutional rights, there is no reason why plaintiff[s] should be delayed in [their] efforts to diligently proceed to sustain [their] claim.' Id.
>
> * * *
>
> It is plainly ludicrous for Mr. Boesky to argue that it is 'unfair' to compel him to face the civil law suits against him which are the creations of his own alleged misconduct. The plight which he imagines that he is in stems solely from his own activities. Surely it would be anomalous to suspend plaintiffs' rights in these civil litigations because they will deal with Mr. Boesky's misconduct.
>
> The only unfairness that the Court perceives is the moving party's assertion that it would be unfair to treat him normally. The defendant seems to be seeking privileged litigating status because of his own delinquencies. 'That defendant's conduct also resulted in a criminal charge against him should not be availed of by him as a shield against a civil suit and prevent plaintiff[s] from expeditiously advancing [their] claim.' Paine, Webber, 486 F.Supp. at 1119. . . .

> Plaintiffs have a substantial interest in the efficient conduct of this complex litigation, and in compliance with the Federal Rules of Civil Procedure. Stalling the case . . . would be counter-productive and prejudicial to plaintiffs, especially where there are so many claimants to the potentially limited funds for satisfaction of the potential damages in this and related litigation in which Mr. Boesky is involved." (Emphasis supplied.)

Id. at 1497.

The defendant asserts that his lack of financial resources to retain an attorney and the diversion of his time from defending against the criminal suit are the elements which would make proceeding with the civil case unfairly prejudicial. Yet, these very arguments were rejected in Paine, Webber, Jackson & Curtis v. Marlon S. Andrus, 486 F.Supp. 1118 (S.D.N.Y. 1980), where the Court stated:

> "Absent a showing of undue prejudice upon a defendant or interference with his constitutional rights, there is no reason why plaintiff should be delayed in its efforts to diligently proceed to sustain its claim, . . ."

infra. and

> "[T]o permit plaintiff to proceed in a normal course against [defendant] would not prejudice him in the criminal prosecution."

Id. at 1119.

The third prong of the test for determining whether to grant a stay calls for examining the potential harm which would result to the opposing party if the stay is granted. The potential harm to NCUA is the inability to discover the assets possessed by Mr. King and eventually distribute them to creditors. Mr. King has argued that NCUA will not be harmed by a delay in the proceedings. This is simply not true. Other creditors are pursuing their claims to judgment. Plaintiff will, to a

certainty, be forced to litigate endlessly its right to priority, and without having a judgment itself there can be no assurance it will succeed.

Since this Court has no power to stay state court lawsuits, 28 U.S.C. § 2283, there can be no guaranty that the attachment and receivership will be adequate to gain plaintiff a first priority position with respect to other judgments. It would be grossly unfair to stay the plaintiff from pursuing its own claim to judgment. Even worse, while barred from pursuing its claim to judgment, plaintiff will unquestionably be forced to the expense of litigating the priority claims of other creditors.

This is yet another case in which we are told, the rights of the victims are of no consequence. The rights of the thief are so important that they must even control over the right of the victims to recover back the proceeds of the thief. Nothing in the law or logic justifies the unfair result which the defendant seeks by his Motion.

Finally, the plaintiff has offered to receive these records under the most stringent confidentiality order imaginable, a copy of which is attached to the Magistrate's Order of December 27, 1989.

We submit that the court can and should attempt to accommodate the interests of both parties. King would be delighted by a stay of a full discovery of his assets, and possible accomplices. But such a stay would directly contravene the statute, 12 U.S.C. § 1787(a)(1)(A), and would be contrary to the vital public interests.

D.

IF THE COURT IS INCLINED TO STAY DISCOVERY, IT SHOULD CERTIFY IT FOR APPEAL.

While we believe it is imperative that a means be found to enable the liquidating agent to proceed to discover, through available records, the full extent of Mr. King's liability, all

available proceeds and assets and the possible existence of participants in his misdeeds, if the court is inclined to enter a stay, we respectfully submit that it should certify it, pursuant to 28 U.S.C. § 1292(b), as a "controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the Order may materially advance the ultimate termination of the litigation."

The issues are far too vital to allow them to remain on hold indefinitely.

PART 2

BRIEF ON APPEALS FROM THE MAGISTRATE'S ORDER OF JANUARY 4, 1990.

A. PLAINTIFF'S APPEAL IS VERY LIMITED

The plaintiff appealed the Magistrate's Order of January 4, 1990 only after the Department of Justice had done so. Even so, plaintiff's appeal was a limited one. It does not object to the taking of Mr. Kirchner's deposition and we would not have appealed an Order that it be taken under an Order of Confidentiality. The plaintiff's primary objection is that it excludes all persons other than counsel from the deposition and prohibits counsel from discussing the occurrence with his client. This divorcing of the lawyer from the client is unprecedented and, we think, unjustifiable. It has the effect of impairing the ability of the client to make informed decisions with respect to the conduct of the litigation and alters the nature of the attorney-client relationship by placing the attorney in control, superior to his own client.

The Order excluding parties from the deposition and from later being told of its contents or having access to the deposition is in contravention of Federal Rule of Evidence 615 which provides:

> "At the request of a party the court shall order witnesses excluded so that they

> cannot hear the testimony of other witnesses, and it may make the order on its own motion. This rule does not authorize the exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause." (Emphasis added).

The notes of the advisory committee point out:

> "Exclusions of persons who are parties would raise serious problems of confrontation and due process. Under accepted practice they are not subject to exclusion."

6 Wigmore § 1841.

Previous orders of the court had, at our suggestion, included Mr. Robert Fenner, Washington, D.C., the general counsel for NCUAB, and Mr. James Stewart, a Washington attorney, within the circle of those with whom the contents could be discussed. With that provision, the Order would be acceptable to plaintiff.

B. HISTORY OF THESE PROCEEDINGS.

On February 3, 1989, Erickson and Sederstrom were counsel for Lawrence E. King, Jr. in these civil proceedings. On that date the plaintiff served a Notice to take the deposition of that firm and a subpoena requiring the production of documents in their hands relating to the Kings and their various entities (filing 141, Exh. 1). On February 16 a records production pursuant to the subpoena occurred and the court reporter's transcript of that production, is in evidence as filing 141, Exh. 2. Mr. James B. Cavanaugh attended for the law firm. Certain records were produced. Other records were held back under a claim of attorney-client or work product privilege (filing 41, Exh. 2, pg. 10). Mr. Cavanaugh committed his firm to retain the documents in its possession (filing 141, Exh. 2, pg. 14):

"Mr. Cavanaugh: I told you what I will agree with you on is that we will hold all of these things and we will make arrangements when Mr. King has new counsel or if he doesn't get new counsel.

Mr. Robinson: How can you agree not to give them to Mr. King if you withdraw?

Mr. Cavanaugh: We will give them -- we will give you adequate notice that you can get every court order you want to freeze the files or whatever. That's an agreement that I will make with you. That's an agreement we'll abide by."

Eventually, Mr. Cavanaugh, on April 20, 1989, produced a list of documents which he claimed were protected by the attorney-client privilege. That list is Exhibit 3, filing 141.

Then on August 31, 1989, after Mr. Achelpohl had been appointed, a further notice of records deposition was served. Mr. Cavanaugh responded on September 1, 1989 (filing 141, Exh. 6) stating that he did not intend to appear and again asserting the privileges. A Request for Production was served upon Mr. King and his new counsel (filing 141, Exh. 7), to which Mr. King and his new counsel responded (Exh. 8, filing 141). The documents in the meantime were transferred to Mr. Achelpohl in violation of Mr. Cavanaugh's commitment. (Achelpohl Aff., Dec. 4, 1989).

Plaintiff then filed a Motion to Require Production.

Mr. Achelpohl has delivered, we understand, all of the documents to the Magistrate's office, together with two lists (1) a list of those documents claimed to be protected by the Fifth Amendment privilege against self-incrimination and (2) a second list of documents as to which an attorney-client privilege and work product privilege are asserted.

On December 13, 1989, the Magistrate signed a Memorandum and Order declining to allow production of the documents claimed to be incriminating -- list number 1 above.

The court scheduled an evidentiary hearing on January 15 for the purpose of determining the applicability of the attorney-

client privilege and work product privilege with respect to the remaining documents.

C. THE IMPORTANCE OF THE DISCOVERY SOUGHT.

The documents now in issue include some documents and records of the Credit Union itself. The liquidating agent is by statute the owner of and entitled to the possession of those records. The withholding of those documents from the liquidating agent under a claim of attorney-client or work product privilege is wholly specious. Allowing King to withhold records owned by the Credit Union is an unjustified interference with the liquidating agent's performance of its statutory duties. This is particularly true since a large amount of the funds of the Credit Union remain unaccounted for (Kirchner Aff., p.18).

The bulk of the documents were withheld under a claim of the attorney-client privilege and work product privilege. It is the plaintiff's position that those documents are not privileged by reason of the crime fraud exception. Neb. Rev. Stat. § 25-503(4). Mr. King during 1986, 1987 and 1988 was very clearly utilizing the services of Erickson & Sederstrom to stall the efforts of the IRS to obtain documents from the Credit Union relating to his receipt of funds from the Credit Union. During the period of that stalling, Mr. King continued his massive thefts from the Credit Union -- a total of approximately ten million dollars for the three years involved (Kirchner Aff. ¶ 25c). Mr. King's attorneys handled a number of the transactions in which thefts occurred and the funds were laundered through their trust accounts (perhaps unknowingly).

The evidence now before the court establishes the crime fraud exception to the attorney-client privilege. Included in the evidence submitted in support of the Motion for Summary Judgment, is the deposition of Mr. King, in which he admits expenditures in excess of $800,000 from Credit Union funds. His only explanation is that he thought he had money on deposit which

he intentionally did not show on the books and records of the corporation in order to evade paying income taxes on it. (Filing 141, Exh. 11). In late 1986 the IRS served subpoenas upon the Credit Union to obtain its records relating to amounts received by Mr. King. His attorneys filed a Petition to Quash in this court at Civil No. 87-0-5. Simultaneously, Mr. Morrow of Erickson & Sederstrom wrote a letter to Mr. King as treasurer-manager of the Franklin Community Federal Credit Union saying:

> "This will acknowledge and thank you for your letter of January 5, 1987 (filing 141, Exh. 13). We were quite disturbed at the contents of it. . . . As we have indicated to you, we have grave concerns as to the developments of this matter. We have therefore proceeded and filed the Petition to Quash. . . . If, in fact, there is no damaging or potentially damaging information included, it will still be possible for us to dismiss the Petition to Quash and then the Credit Union can go ahead and deliver the materials."

By those means Mr. King, through his attorneys (perhaps unwittingly), was able to stall the IRS investigation from January 5, 1988 until September 22, 1988. Thus the applicability of the crime fraud exception is not seriously in doubt. It is proven by Mr. King's deposition admissions and by the court file in the proceedings to quash.

The evidence will show that Mr. King embezzled from the Credit Union to purchase the Cafe Carnevale and the transaction was handled by his attorneys, with the purchase money passing through their trust account. The total eventually diverted by Mr. King to Cafe Carnevale was $505,463. (Kirchner Aff. ¶ 25c).

Mr. King used embezzled funds to purchase the Show Case Lounge and that transaction was handled by his attorneys, with the purchase money passing through their trust account. The total eventually diverted to Show Case Lounge approaches $220,000. (Kirchner Aff. ¶ 25c).

His attorneys assisted him in leasing a home in Washington, D.C., with a rental of approximately $4,500 a month. All rental payments were embezzled from the Credit Union.

The fees and expenses paid to his attorneys for services to him and his entities were, without exception, paid with Credit Union checks from embezzled funds.

A review of the lists of documents being withheld will quickly show that many of them involve the delay of the tax audit, the purchase of the Cafe Carnevale, the purchase of the Show Case Lounge, etc. These examples illustrate the applicability of the crime fraud exception and the necessity for the liquidating agent to be given access to these records at this time. Those are important evidence in this case and the records may help in the location of proceeds and assets. They are also important to help determine the degree of participation of third parties and their liability or nonliability for portions of the loss.

D. THE DEFENDANT'S POSTURE

From the beginning, Mr. King's criminal counsel have sought to provoke the court to stay civil proceedings. To that end, its entire approach to the Kirchner deposition has been a posture designed to manipulate the Department of Justice and the court into an untenable position.

On November 21, 1989, the plaintiff filed a "Plaintiff's Designation of Expert Witnesses," naming Mr. Robert Kirchner and Mr. John Queen as its experts for the trial of the action. Mr. King, through his court appointed counsel, immediately noticed the deposition of Mr. Robert Kirchner, demanding that Mr. Kirchner bring with him 12 categories of documents. While counsel postured that the deposition was intended to prepare for the privilege hearing, only one category of documents related specifically to the Erickson & Sederstrom documents. The remaining 11 categories sought documents broadly applicable to the reconstruction of the books and records of Franklin Community

Federal Credit Union. Simultaneously, King's criminal counsel filed a Motion for Protective Order, asking that all but counsel be excluded from the deposition and that those present be ordered not to reveal the content to any person and further requesting that all copies of the deposition be sealed. Not surprisingly, that Notice and Motion provoked the Department of Justice to file a Motion for Intervention, which it did on January 2, 1990. The Magistrate on January 4 filed his Memorandum and Order requiring the deposition of Mr. Kirchner to go forward pursuant to a Protective Order in the terms requested by King's criminal lawyers.

We believe it is clear that the entire episode has been designed by King's criminal counsel to provoke a stay of the civil proceedings. This is demonstrated first by the overreaching nature of its subpoena duces tecum, seeking documents far beyond those related to the attorney-client and work product privileges or to the crime fraud exception and seeking discovery in the entire reconstruction effort.

Further, the only basis suggested for the draconian protective order was the transparent posture that counsel might reveal some trial strategy for the criminal case. The obvious answer to that position is that the problem only arises because counsel for King hope to use the deposition for discovery in the criminal case while excluding the U.S. Attorney. Counsel need not and should not reveal his trial strategy and in no event is that a consideration which should influence, much less control, the court's decision.

More importantly, when plaintiff sought to obviate this problem by agreeing not to utilize Mr. Kirchner or Mr. Queen at the hearing on document production, King's counsel continued to insist upon the deposition. The Magistrate concluded (January 4, 1990 Memorandum and Order, pg. 11, note 7):

> "The NCUAB contemplated withdrawing Kirchner as a witness regarding the Motion to Compel. This would not obviate the problem.

> Neither the NCUAB nor the government has a right to orchestrate from whom King seeks relevant evidence under Federal Rule of Civil Procedure 26."

The Magistrate overlooked that Mr. Kirchner is an expert witness and only that. He was not a participant in the factual circumstances as they developed. Thus, his testimony is governed by F.R.C.P. 26(b)(4). As an expert "who is not expected to be called as a witness" King could be permitted to take the deposition only on a "showing of exceptional circumstances."

Even as a witness expected to be called at trial, the deposition of such a witness is not a matter of right under 26(b)(4)(A)(ii).

Finally, it is inconsistent for Mr. King's counsel to urge that he needs the deposition of Mr. Kirchner and simultaneously urge the court to stay discovery. The insistence upon a deposition of Kirchner is simply a pretense calculated to provoke the U.S. Attorney to ask for a stay of discovery which is what Mr. King actually hopes for. We urge the court not to reward this manipulation with success.

CONCLUSION

We respectfully pray the Court enter an Order as follows:

1. Denying the defendant's Motion for Stay of Discovery;

2. Amending the Magistrate's Order of January 4, 1990 to allow disclosure to the parties or designated representatives of the Kirchner deposition.

3. Alternatively, allowing plaintiff to withdraw Mr. Kirchner as expert at the January 15 hearing, quashing the Notice of Deposition of Mr. Kirchner; and

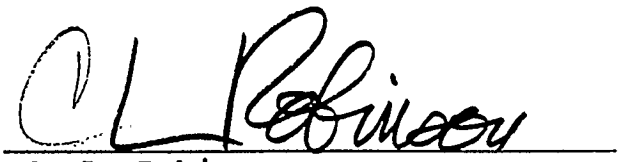
4. Ordering the hearing to go forward on defendant's claim of attorney-client and work product privileges.

The court should not allow the defendant's posturing to interfere with the statutory work of the NCUAB of seeking out

proceeds and assets and other persons who may be liable for the enormous loss in this case.

Respectfully submitted,

NATIONAL CREDIT UNION ADMINISTRATION, as Liquidating Agent for FRANKLIN COMMUNITY FEDERAL CREDIT UNION, Plaintiff,

By 

C. L. Robinson
For FITZGERALD, SCHORR, BARMETTLER & BRENNAN
1000 Woodmen Tower
Omaha, Nebraska 68102
(402) 342-1000

Attorneys for Plaintiff.

CERTIFICATE OF SERVICE

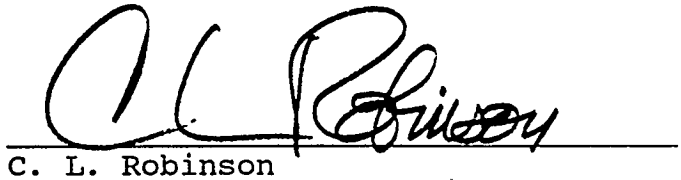
The undersigned hereby certifies that the above and foregoing Brief on Motion for Stay was served upon all parties to this action by mailing, by first-class United States mail, postage prepaid, a true and correct copy thereof to the following persons this 9th day of January, 1990:

Lawrence E. King, Jr.
2012 Wirt Street
Omaha, Nebraska 68110

Steven E. Achelpohl
100 Historic Library Plaza
1823 Harney Street
Omaha, Nebraska 68102

Jerold V. Fennell
Suite 225, Regency Court
120 Regency Parkway Drive
Omaha, Nebraska 68114

Thomas D. Thalken
P.O. Box 1228 DTS
Omaha, Nebraska 68101



C. L. Robinson

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

AMERICAN EXPRESS COMPANY,	)	DOC. 877 NO. 785
Plaintiff,	)	
vs.	)	JUDGMENT
LAWRENCE KING, JR.	)	
Defendant.	)	

The Court, being fully advised of the premises herein, finds that the Motion for Default Judgment of the Plaintiff is true and proper in all respects and should be granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that judgment be and hereby is entered against the Defendant in the amount of $102,585.46, plus interest in the amount of $7,317.72, for expended costs of $71.50, for a total of $109,974.68, plus interest at the judgment rate.

DATED: Dec 6, 1989.

BY THE COURT:

District Judge

PREPARED AND SUBMITTED BY:

MARK QUANDAHL #18634
THOMPSON, CROUNSE, PIEPER & BRUMBAUGH, P.C.
5060 Dodge Street
Omaha, Nebraska 68132
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January 10, 1990

The Honorable Richard G. Kopf
U.S. District Court
Ed Zorinski Federal Building
17th & Capitol Building
Omaha, NE 68101

RE: U.S. v. [redacted] CR89-0-63

Dear Judge Kopf:

Enclosed please find a Motion for Extension of Time limits for Discovery, Pre-trial Motions and Trial along with all attachments which was filed with the Clerk's office today. I have been in contact with Mr. [redacted] attorney, and he joins in this Motion.

b6
b7C

I have also contacted Mr. [redacted] and Mr. [redacted] concerning a hearing date, both have advised that they are available at your convenience.

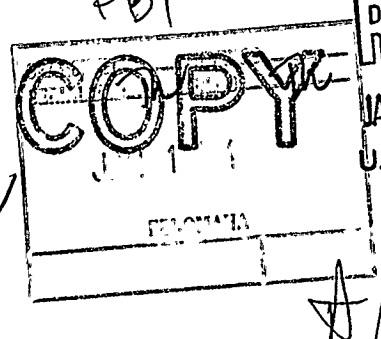
Thank you for your consideration of this matter.

Very truly yours,

[redacted]
For the Firm

SEA:dw
Enclosures
cc: [redacted]
K/Kopf

147A-371-1051
FBI



REC'D
JAN 11 90
U.S. ATTORNEY
OMAHA

FILED
DISTRICT OF NEBRASKA
AT _____ M
DEC 27 1989
Norbert H. Ebel, Clerk
By _____ Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

NATIONAL CREDIT UNION ADMINISTRATION BOARD, etc. Plaintiff, v. LAWRENCE E. KING, JR., et al., Defendant.	CV88-0-819, CV 88-0-918, and CV89-0-99 MEMORANDUM AND ORDER

After I issued my memorandum and order of December 13, 1989, the National Credit Union Administration Board (NCUA) orally requested that I reconsider. Oral argument on the oral motion was held.

During the oral argument, counsel for the NCUA agreed that the court could enter a confidentiality order essentially precluding the NCUA from using the documents for which King claimed the self-incrimination privilege without further order of the court. In other words, the NCUA would concede that, except for examination of the documents by three specifically designated lawyers, the NCUA could not examine or otherwise use the documents for which King claimed the fifth amendment privilege without further order of the court. I asked the NCUA to prepare a draft of a proposed confidentiality order. I received the draft on December 21, 1989, and I attach the draft to this memorandum and order.

Mr. King, through his court appointed counsel, objects to the utilization of a confidentiality order for two reasons. First, King continues to assert that unless the confidentiality order is the functional equivalent of a grant of immunity, then King is not

EXHIBIT
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obligated to accept, and this court should not order, anything less than a functional equivalent of immunity and the confidentiality order is not functionally equivalent to immunity. Second, King argues as a practical matter that his fifth amendment privilege is not limited to the pending criminal case or the pending related civil cases, but may also pertain to other matters, and, the confidentiality order proposed by the NCUA is limited (see paragraph 8A) to matters having to do with the present federal criminal prosecution. Thus, King argues that the imposition of the confidentiality order might effectively waive King's fifth amendment privilege as to matters not yet filed in the courts.[1]

I need not determine whether King's second argument is persuasive, because I believe that his first argument is compelling. Since immunity has not been granted by the United States of America as to the use of the documents in question or the act of production, and since the United States of America is not a party to the civil cases, and is therefore not bound by any proposed protective order, this court lacks the ability to grant

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[1]During a telephonic oral argument in this case, King's lawyers advised the court that the Nebraska legislature had been "investigating" certain matters totally unrelated to the pending criminal and civil cases in the United States District Court for the District of Nebraska, but allegedly having to do with the failure of Franklin. While counsel for King were careful to point out that they in no way intended to imply that any other criminal actions would be filed against Mr. King or that any such criminal actions would properly be filed against Mr. King, counsel noted that the existence of an ongoing investigation by a state entity illustrated the significance of preserving King's fifth amendment privilege not only for the pending federal criminal case but also for other cases which might be filed in the future.

the functional equivalent of immunity to King arising out of production of the documents.

As I said before, in my view King has an absolute constitutional right to rely upon his fifth amendment privilege or to have the functional equivalent of immunity as to the use of the compelled response. See United States v. Doe, 465 U.S. 605, 614-16 (1984); Kastigar v. United States, 406 U.S. 441, 443-47 (1972). In essence, I believe that a protective order must leave King "in substantially the same position as if [he] had claimed the Fifth Amendment privilege." Kastigar, 406 U.S. at 462. As Professors Wright and Miller indicated: "Whether the court, in a civil action, can provide protection equivalent to an immunity statute, as is needed if the claim of privilege is to be overcome, seems doubtful." 8 C. Wright & A. Miller, Federal Practice & Procedure § 2018, at 153 (1970) (footnote omitted).

In this case, as I pointed out previously, accountants for the NCUA are working closely with the Justice Department in the prosecution of the King criminal case. Although I do not question for a moment the integrity of counsel for the NCUA, even if I were to restrict disclosure of documents to counsel for the NCUA, the close working relationship in the criminal case of the NCUA's accountants with the Justice Department suggests that even inadvertent disclosure to the NCUA's own accountants would almost certainly cause the documents or their contents to fall into the hands of the Justice Department. In this connection, I note that at least some of the documents would probably require the

assistance of accountants to fully understand the documents (e.g., filing 158, Def's. sealed Ex. 14, items 140-144). Since the United States of America has not granted King immunity as to these documents, and since the United States of America is not a party to the civil actions and is therefore not bound by any order this court might enter in regard to the use of such documents, what King would be doing is trading this privilege for a court order which would not be functionally equivalent to and co-extensive with his fifth amendment privilege.

Put simply, King is not required to accept the risk that his fifth amendment privilege will be compromised; rather, King is entitled to a reasonable guarantee that his privilege will be honored and this the court cannot provide, particularly where the United States of America is not a party to any order which the court might enter.

IT IS ORDERED THAT:

1. The proposed confidentiality order of the NCUA shall be filed together with this memorandum and order;

2. The oral motion to reconsider by the NCUA of the memorandum and order of the undersigned filed December 13, 1989 is denied.

DATED this 27th day of December, 1989.

BY THE COURT:

Richard G. Kopf
United States Magistrate

FILED
DISTRICT OF NEBRASKA
AT _____ M
DEC 13 1989
Norbert H. Ebel, Clerk
By _____ Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

NATIONAL CREDIT UNION ADMINISTRATION BOARD, etc.,	)	CV 88-0-819, CV 88-0-918, CV 89-0-99
Plaintiff,	)	
vs.	)	MEMORANDUM AND ORDER
LAWRENCE E. KING, JR., et al.,	)	
Defendants.	)	

Presented to me is the motion of the National Credit Union Administration Board, as liquidating agent for the Franklin Community Federal Credit Union, ("NCUA") (filing 141, 88-0-819)[1] to compel the production of various books and records belonging to, in the possession of, or under the control of the defendant Lawrence E. King, Jr. King, in contrast, seeks a protective order from being forced to turn over the documents and respond to an interrogatory that required King to specify documents he had not produced upon an attorney-client privilege or work-product doctrine claim (filing 137). King also seeks a protective order (filing 137) prohibiting the taking of a records deposition regarding these documents, to the extent one is requested of King's present or former lawyers.

In this memorandum, I deal only with King's assertion of his privilege against self-incrimination under the fifth amendment to the Constitution and the question of whether King should be granted

[1]Unless otherwise indicated to the contrary in the text, all references to filing numbers will be to CV 88-0-819, although there are identical filings in the related cases appearing in the caption of this memorandum and order.

EXHIBIT
C

a protective order in that regard.[2] Other issues are to be resolved at a later date. I deal with this issue now in order that King's counsel can know as to other privilege questions whether they are obligated to identify certain documents as a condition precedent to asserting various privilege claims other than the fifth amendment claim. King's counsel tell me that they may need to identify documents with some particularity in order, for example, to assert an attorney-client privilege for a certain document. But King's lawyers are reluctant to make the identification for fear that the act of identifying the documents may be construed to be an incriminating testimonial act on the part of King violative of King's self-incrimination privilege or that the act of identification might otherwise waive the fifth amendment privilege claim. In other words, King's lawyers do not want to forego the self-incrimination privilege in order to assert another privilege. Submitted to me for in camera examination are four boxes of documents; a green or yellow piece of paper with the notation "5th" or "Fifth" is appended to each document for which the claim of self-incrimination is made. An ex parte typewritten exhibit list identifying the documents with some particularity has been received by the court and ordered sealed (filing 158). The exhibit list asserts for each numbered document the privilege(s) claimed by King with regard to each exhibit. Some of the documents

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[2]Thus, at this time I will not deal with King's motion to stay discovery (filing 138), but I will defer ruling on that motion until all the privilege claims have been submitted.

also have privilege claims in addition to the fifth amendment claim.

I. FACTS[3]

King faces a forty-count criminal indictment in this court alleging among other things that King participated in a conspiracy to defraud the United States by impeding the Internal Revenue Service and the NCUA. (Filing 152, Def's Exh. 1, Count I). This conspiracy is predicated upon the claim that King abused the Franklin Community Credit Union ("Franklin") and the Consumer Services Organization, Inc. ("CSO") while King was manager of the former and president of the latter. (Filing 152, Def's Exh. 1, Count 1, A & B). King and his family are said to have embezzled more than twelve million dollars from Franklin, and part of the conspiracy was alleged to involve the filing of false income tax returns. The conspiracy is said to have spanned between the dates of July 1, 1976 and May 19, 1989, the date the indictment was handed up. King asked for and received court-appointed counsel in the criminal case, and court-appointed counsel have received permission to enter a limited appearance in the civil case against King, but counsel have been precluded from initiating discovery in the civil case without express approval of this court if they wish

[3]The United States of America is not a party to this action. The statements of the court made herein are not intended to be used for any purpose in proving or disproving the merits of the indictment in the criminal case styled United States of America v. Lawrence E. King, Jr. and Alice Ploche King, CR 89-0-63 or in any related criminal cases.

to be paid under the Criminal Justice Act for such services. (Filing 152, Def's Exh. 11).[4]

King is sued, or is otherwise involved, in these civil cases because the NCUA claims that King and others devoted the resources of Franklin to the personal benefit of the various defendants. (See Filing 1 (Complaint)). King is only a party in one case, and King's court-appointed counsel have entered an appearance in only one case, CV 88-0-819. The civil complaint against King was filed before the criminal indictment was handed up. (Id.) In the civil complaint against King, it is contended that from about 1970 to

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[4]King's lawyers argue that I also prohibited King personally from taking discovery in the civil case when I entered my orders in the criminal case instructing King's lawyers in the criminal case as to what their duties were in the civil case. There is no such explicit limitation in any of the orders issued in the criminal case insofar as King personally is concerned. (See Filing 152, Def's Exh. 11, pp. 6-7 & n.2). I did acknowledge in oral comments from the bench in the criminal case that if King attempted to use discovery in the civil case to frustrate the discovery limitations in the criminal case inherent in the Federal Rules of Criminal Procedure, such action would likely be prohibited. Because I may have inadvertently confused King individually, I wish to clarify now that such comments were not intended to limit King or any lawyers he retains privately in the civil case from initiating proper discovery in the civil case. While some civil discovery devices may well frustrate the Federal Rules of Criminal Procedure in a given circumstance, the court should deal with those questions on a case-by-case basis. I will leave it to the United States to seek a protective order in the civil case if it believes that its interests are being harmed in the criminal case should King pro se or with retained counsel seek discovery in the civil case. My written instructions to King's court-appointed counsel, however, have not changed. I emphasize that King's lawyers in the criminal case are entitled to seek permission to engage in civil discovery by filing a request in the criminal case should they think that discovery in the civil case is necessary to assert or protect a claimed privilege applicable in the criminal case which may be waived or impaired in the civil case absent discovery in the civil case, e.g., defending the attorney-client privilege from the crime/fraud exception.

November of 1988 King engaged in fraudulent, dishonest and illegal acts involving the transfer of Franklin assets in an amount in excess of thirty-four million dollars. (Id.) Among other things, the suit against King prays for a judgment against King in excess of thirty-four million dollars, restitution, the imposition and declaration of a constructive trust, and for an accounting. (Id.) In each of these civil cases, King and his court-appointed counsel have been served with requests to produce and also an interrogatory. (See Filing 137, Exhs. A & B).

The requests to produce, which are addressed to King and his appointed counsel, state in pertinent part: "[P]laintiff requests that the defendant, [King], produce and permit the plaintiff to inspect and copy the following documents and evidence ...." (Id., Exh. A). Request number 1 sought: "All documents in his possession produced, received by him or by his present counsel from Erickson & Sederstrom, P.C. relating to [King, his wife, related corporations including Franklin] and any trusts established by [King and his wife]." (Id.) Request number 2 sought: "Any other documents not previously produced relating to the subject matter set forth in plaintiff's Complaints in these matters." (Id.)

One interrogatory which was served on King is at issue here. It asked King to identify with particularity any document he refused to produced based upon a claim of the attorney-client privilege or the work-product doctrine in as much detail as was possible without disclosing its contents, including a specification as to the general nature, the identity and position of the author,

the date, the identity and position of the addressee, the identity and position of all persons who were given copies, the document's present location, the identity and position of the custodian, and the specific reason(s) why the document was withheld from production. (Id., Exh. B).

There is no evidence that King's court-appointed lawyers have ever been served with a subpoena to produce the documents.

King was previously represented by the law firm of Erickson & Sederstrom in virtually all of King's legal affairs during the pertinent times, and the firm represented King in the one civil case until the firm was allowed to withdraw on March 22, 1989. (Filing 90). On February 16, 1989 a records deposition was taken of the law firm of Erickson & Sederstrom by the NCUA. (Filing 141, Attachment, Exh. 2). Apparently, Erickson & Sederstrom was served with a subpoena and a notice of deposition. (Id., Exh. 1). The notice of deposition was addressed to King, his wife and an Erickson & Sederstrom lawyer. (Id.) In that records deposition Erickson & Sederstrom told an NCUA lawyer that Erickson & Sederstrom was appearing on its own behalf and not for King. (Id. 5:25-6:7). King was not represented and did not appear at the deposition. (Id. 4:1-8). Erickson & Sederstrom refused to produce anything related to "Mr. King's tax problems," communications between King and Erickson & Sederstrom, "anything that Mr. King sent to [Erickson & Sederstrom] in [its] capacity as counsel for [its] review and [its] confidential communication back to him," and "anything that is work product." (Id. 9:5-14). The records that

are at issue here were evidently in the possession of Erickson & Sederstrom during the records deposition. (Id. 10:5-11).

King was deposed for a second time in the civil case on March 31, 1989. (Id., Exh. 11). During that deposition King was not represented by counsel, but he acknowledged that his previous counsel had advised him "generally of [his] rights in a deposition" and that he understood that he had a right to refuse to answer questions which might tend to incriminate him. (Id., Exh. 10 (Deposition), 2:1-14). During that deposition, King said that he had no objection if counsel for NCUA "look[ed] at the records that Erickson & Sederstrom ha[d]." (Id. 3:6-18).

On April 20, 1989, Erickson & Sederstrom wrote counsel for the NCUA and set forth a twenty-page description of the various documents which had been withheld and keyed to various assertions of attorney-client privilege or work-product claim. (Id., Exh. 3). On May 15, 1989 an NCUA lawyer wrote Erickson & Sederstrom indicating that King had waived, in writing, the attorney-client privilege, and as a consequence the NCUA wanted to obtain the remainder of the documents. (Id., Exh. 4 (no copy of the waiver is attached to the letter, despite the fact that the letter states that a copy was attached)). After King was indicted on May 19, 1989, King's court-appointed counsel instructed Erickson & Sederstrom to refuse to produce the documents. (Id., Exhs. 5 & 6).

Although the record is not clear as to precisely where the documents have been since the records deposition in February of 1989, the documents apparently have been in the possession of King,

Erickson & Sederstrom, or King's court-appointed lawyers. At the time they were produced to the court, King and his court-appointed counsel were present in the courtroom, and no one from the Erickson & Sederstrom firm was present. King's court-appointed counsel, when asked by counsel for the NCUA at the hearing on these motions whether King or the lawyers were in "possession" of the documents, refused to answer the question. The NCUA has orally amended its request to produce such that the NCUA agrees that it is not entitled to anything in King's actual possession or authored since the appointment of King's court-appointed counsel.

It is clear from the record that there was an active criminal investigation of King at least as early as August of 1985. (Filing 152, Def's Sealed Exh. 13).[9] Erickson & Sederstrom was aware of this investigation in August of 1985. (Id.) The IRS sought to summons by administrative summons Franklin, through an employee, to produce records involving personal banking transactions relating to King on the 16th of December 1986. (Filing 141, Attachment, Exh. 12). Erickson & Sederstrom, apparently also representing Franklin, advised King not to turn over the documents and moved to quash the process. (Id., Exh. 13). On behalf of King and his wife, Erickson & Sederstrom argued before this court that the IRS process

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[9]I received this evidentiary exhibit for in camera ex parte examination based upon the representation that the exhibit, if disclosed, might reveal a privilege. Having examined the exhibit, and particularly the attachment thereto, I conclude that the attachment (if not the facts recited therein) may well be subject to a valid attorney work-product claim, the revelation of which in support of the fifth amendment privilege claim might have waived the work-product claim as to the document. I therefore continue to decline to make this exhibit available to counsel for the NCUA.

should be quashed, for, among other reasons, the summons would violate King's fifth amendment privilege. (Id., Exh. 14, page 2).

II. LAW

King argues that the documents should not be produced or otherwise identified by answer to interrogatory because: (a) the contents of the documents are testimonial in nature, incriminating in effect, and generated under government compulsion; and (b) the act of identifying and producing the documents would be a testimonial, incriminating act independent of the contents of the documents which, if compelled by the court, would violate King's fifth amendment privilege. The NCUA responds, stating: (a) the contents of many of the documents cannot be subject to the fifth amendment privilege because the documents were not generated under any government compulsion; (b) many of the documents are not covered by the fifth amendment privilege because they are the records of various corporations and not of King; (c) King has waived the privilege; (d) the act of identifying the documents cannot violate the fifth amendment privilege because the NCUA will modify the request to produce to pertain only to documents in the possession of King's lawyers and therefore King need do nothing; (e) since Erickson & Sederstrom has already identified the documents, the act of production will not implicate King's fifth amendment privilege because Erickson & Sederstrom, not King, identified the documents; and (f) any fear of violating the fifth amendment privilege can be obviated by a protective order.

A. THE ACT OF PRODUCTION

I need not, and I do not, determine whether the documents were generated upon government compulsion[4] because I find generally that the privilege against self-incrimination applies even if the documents were voluntarily generated, since the act of producing and identifying the documents, if compelled by this court, would have testimonial aspects and an incriminating effect violative of King's fifth amendment privilege. See United States v. Doe, 465 U.S. at 612-13. The NCUA tacitly concedes this point when it agreed at oral argument to modify its document request to exclude documents in the actual possession of King; for reasons I shall discuss later, I do not find that this concession obviates the problem.

Without doubt, if King were to be compelled to respond to the request to produce (or to otherwise identify documents by answer to interrogatory), he would be establishing the existence, authenticity and possession or control of documents which by

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[4]From a review of the documents there is no question that many of the documents are "testimonial" and all of the documents are "incriminating." See Doe v. United States, 56 U.S.L.W. 4708, 4710 & nn. 5-8 (U.S. June 21, 1988) (holding that the compelled execution of a form authorizing banks to disclose account information was not testimonial for fifth amendment purposes because the form did not acknowledge that an account existed or that it was controlled by petitioner). The more difficult question is whether the documents were generated under some type of government compulsion because, if they were not, then the documents, as opposed to the act of production or identification, are not protected by the fifth amendment. United States v. Doe, 465 U.S. 605, 612 n.10 (1984) (stating: "If the party asserting the Fifth Amendment privilege has voluntarily compiled the document, no compulsion is present and the contents of the document are not privileged.").

definition are either relevant to the civil complaints or which may lead to the discovery of admissible evidence against King in the civil suits. Since it is beyond doubt that the civil complaints track the same ground as the criminal indictment, such production of documents relevant to the civil cases or which might lead to the discovery of admissible evidence in the civil cases would likewise compel the production of incriminating evidence by testimonial act insofar as the criminal case is concerned.

Analysis of the Federal Rules of Civil Procedure is instructive as a starting point. Federal Rule of Civil Procedure 34 requires that any party served with a request to produce "shall serve a written response ... stat[ing], with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated." Fed. R. Civ. P. 34(b). Federal Rule of Civil Procedure 33(a) requires that each interrogatory answer be signed under oath by the party answering the question. Id. 33(a). The request to produce is limited to those items "which are in the possession, custody or control of the party." Id. 34(a) (emphasis added). A request to produce documents must either request relevant documents or documents which will lead to the discovery of admissible evidence consistent with Federal Rule of Civil Procedure 26(b). Id. Interrogatories are likewise limited. Id. 33(b). A request to produce must specify "with reasonable particularity" the documents sought. Id. 34(b). If a motion to compel is granted in this case, it would be directed

to a "party" who would be compelled to "answer" an interrogatory or the party would be compelled to permit "inspection [of documents] in accordance with the request." Id. 37(a)(2).

The Supreme Court has recognized that the act of identifying and producing documents may involve testimonial incrimination:

> Although the contents of a document may not be privileged, the act of producing the document may be. A government subpoena compels the holder of the document to perform an act that may have testimonial aspects and an incriminating effect. As we noted in Fisher:
>
> > "Compliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or control by the taxpayer. It also would indicate the taxpayer's belief that the papers are those described in the subpoena. The elements of compulsion are clearly present, but the more difficult issues are whether the tacit averments of the taxpayer are both 'testimonial' and 'incriminating' for purposes of applying the Fifth Amendment. These questions perhaps do not lend themselves to categorical answers; their resolution may instead depend on the facts and circumstances of particular cases or classes thereof." [Fisher v. United States, 425 U.S.] at 410.

United States v. Doe, 465 U.S. at 612-13 (citations omitted).

In United States v. Doe the district court was faced with a federal grand jury investigation of corruption in the awarding of local governmental contracts. Subpoenas were served on the respondent as an owner of sole proprietorships demanding production of certain business records. The respondent then filed a motion in federal district court seeking to quash the subpoenas. The district court granted the motion (except as to records required by law to be kept or disclosed to a public agency), finding that

the act of producing the records would involve testimonial self-incrimination. The district court found as fact:

> "With few exceptions, enforcement of the subpoenas would compel [respondent] to admit that the records exist, that they are in his possession, and that they are authentic. These communications, if made under compulsion of a court decree, would violate [respondent's] Fifth Amendment rights. . . . The government argues that the existence, possession and authenticity of the documents can be proved without [respondent's] testimonial communication, but it cannot satisfy this court as to how that representation can be implemented to protect the witness in subsequent proceedings.

Id. at 613 n.11 (quoting In re Grand Jury Empanelled March 19, 1980, 541 F. Supp. 1, 3 (1981), aff'd, 680 F.2d 327 (3d Cir. 1982)). The Supreme Court affirmed, concluding that the factual determination of the district court found support in the record. Id. at 614.

In this case, the NCUA states that the act of production cannot prejudice King's fifth amendment rights, since the NCUA has agreed to limit its request to documents only in the hands of King's court-appointed counsel. See Fisher v. United States, 425 U.S. 391 (1976) (holding, among other things, that the fifth amendment privilege for accountant work papers obtained by a client and transferred to the hands of his attorney for purposes of securing legal advice did not apply where lawyers had been served with a summons because the client was not compelled to do anything). I find this argument unavailing for several reasons.

Initially it must be observed that King and King's court-appointed counsel have not been served with process in these cases pursuant to Federal Rule of Civil Procedure 45(b). King's

lawyers are not parties to this litigation, and King is a party in only one case. King's court-appointed counsel have not even entered a general appearance in the one civil case in which King is a party, but they have only entered a limited appearance pursuant to court order for the purposes of protecting King's rights in the criminal case. It is important to note that, as a general matter, "Rule 34 is limited to parties to the action." 4A J. Moore, J. Lucas & D. Epstein, Moore's Federal Practice ¶ 34.02[1] (2d ed. 1989) [hereinafter J. Moore]. Interrogatories are likewise limited to parties. Fed. R. Civ. P. 33(a).

Since court-appointed counsel in these cases came into possession of the documents by reason of their representation in the criminal case and not the civil cases, and since counsel has entered an appearance only to preserve King's rights in the criminal cases, it is doubtful whether King's court-appointed lawyers can be considered a "party" under Federal Rule of Civil Procedure 34. 4A J. Moore, supra, ¶ 34.17 n.8; Hickman v. Taylor, 329 U.S. 495, 504 (1947) (stating that statements of witnesses in the hands of a lawyer could not be procured under Rule 34, since the statements were not in possession of a party). While Erickson & Sederstrom may have been served with process, it is evident that Erickson & Sederstrom no longer has any of the documents. Accordingly, it appears that this court lacks the naked power to compel King's court-appointed counsel to produce the documents or answer the interrogatory as opposed to King himself.

Still further, I do not think that Fisher applies to this case even if I assume that King's court-appointed counsel were in physical possession of the records and this court had authority to direct King's court appointed-counsel to produce the documents and respond to the interrogatory. The Fisher Court held that the fifth amendment privilege would not apply to documents in the hands of a taxpayer's lawyer where the papers had been delivered to the lawyer for purposes of obtaining legal advice not specifically related to protecting the documents from compelled production, but the Court held that the attorney-client privilege would apply to stop production of the documents if the documents were otherwise privileged under the fifth amendment, assuming that the documents had been in the hands of the client. Fisher, 425 U.S. at 404-05. In other words, a client who transfers documents to a lawyer retained by the client to render legal advice, when documents are otherwise subject to the fifth amendment privilege, does not lose the privilege by the transfer, and the privilege is protected by the lawyer asserting the attorney-client privilege.

Fisher explicitly recognized that there may be situations where the actual physical possession of a document in the hands of a representative maybe meaningless because "constructive possession is so clear or relinquishment of possession so temporary and insignificant as to leave the personal compulsion upon the taxpayer substantially intact." Id. at 398 (citing Couch v. United States, 409 U.S. 322, 333 (1973)). King's case is an example of one of the constructive possession cases about which the Court spoke. It is

clear that the documents, if they were transferred to King's court-appointed counsel, were transferred only constructively for the very purpose of asserting the fifth amendment privilege. Four boxes of documents needed to be transferred to King's lawyers so they could in good faith review each and every document to determine what privileges might apply. There is no evidence that the documents were transferred to the lawyers for any purpose other than to allow them to assist King in asserting his privilege. Here, in order to grant the NCUA the relief it seeks, this court would necessarily have to require King as a party to direct his lawyers to turn over the documents transferred to the lawyers so they could tell King whether and how to assert the fifth amendment privilege. Thus, if the act of producing and identifying the documents, assuming that the documents had been in the hands of King, would have been protected by the fifth amendment privilege, the same acts are privileged on fifth amendment grounds while the documents were in the constructive possession of the lawyers for the purpose of asserting the fifth amendment privilege on behalf of King.

Moreover, even if the documents were not in the constructive possession of King's court-appointed lawyers, but had been delivered to them for some purpose other than for asserting the fifth amendment privilege, the act of producing and identifying the documents is still privileged on attorney-client privilege grounds according to Fisher, 425 U.S. at 404-05. The NCUA attempts to

avoid the Fisher holding in this regard by asserting the crime-fraud exception to the attorney-client privilege.

Essentially, the NCUA contends that King used Erickson & Sederstrom to unlawfully delay the IRS investigation, and thus King's court-appointed lawyers cannot shield documents produced as a result of that unlawful conduct. Even if I assume that the crime-fraud exception applies to the documents in the hands of Erickson & Sederstrom, the crime-fraud exception pierces only the attorney-client privilege as it might be asserted by Erickson & Sederstrom on behalf of King while the documents were in the hands of Erickson & Sederstrom. Clearly, if King now had the documents he could not be compelled under the fifth amendment to produce and identify the documents for the reasons explained above. This is true even if the crime-fraud exception might pierce the attorney-client privilege had the documents been in the hands of Erickson & Sederstrom because the crime-fraud exception is an exception to the attorney-client privilege and not the fifth amendment privilege.[7] If one assumes that King obtained the documents from Erickson & Sederstrom and transferred them to his court-appointed counsel the crime-fraud exception is still not applicable. There is no contention that court-appointed counsel participated in the crime or fraud. Thus, insofar as the act of production and

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[7]Pursuant to Federal Rule of Evidence 501, this court should look to Nebraska law to apply the crime-fraud exception. The crime-fraud exception applies only to the attorney-client privilege, Neb. Rev. Stat. § 27-5034(a) (Reissue 1985), and not to the fifth amendment privilege under the United States Constitution. Id. § 27-501 (Reissue 1985).

identification is concerned, even if there was a crime or fraud involved in Erickson & Sederstrom's actions taken at the request of King, court-appointed counsel can assert the attorney-client privilege as to the act of production or identification because those acts are in no way associated with the crime or fraud.

I thus conclude that the court-compelled act of producing and identifying the documents would violate King's fifth amendment privilege unless there is some other reason that the fifth amendment privilege is not applicable.*

B. CORPORATE RECORDS

The NCUA contends that the fifth amendment does not apply because many of the documents are corporate documents and they must be produced even if indirectly incriminating to the custodian. See Braswell v. United States, 56 U.S.L.W. 4681 (U.S. June 22, 1988). In Braswell, the Court held that where the president of two corporations was served with a subpoena as president of the corporations requiring him to produce the corporations' records,

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*The NCUA argues that it is asking only for documents that King's lawyers received from Erickson & Sederstrom, and thus there is nothing incriminating about King being required to produce and identify the documents since the request is not particularized as to anything but documents received from Erickson & Sederstrom lawyers. This argument is not persuasive. First, the NCUA contends that the documents were part of a crime or fraud and by definition the act of producing these documents and identifying them would be incriminating. Second, if the requests are not "particularized," then they are objectionable under Federal Rule of Civil Procedure 34(b). Third, if one construes the requests as particularized, e.g. request number 2, the only conclusion that can be fairly drawn is that these requests pertain to the subject matter of the NCUA's complaints, and thus, due to the similarity between the civil actions and the criminal case, the requests are necessarily incriminating.

the custodian of the records could not resist the process on the grounds that the act of production would indirectly incriminate the custodian. Id. at 4686. This was so because the custodian produces the record as an agent and not personally, and a corporation has no fifth amendment privilege. The Court was very careful to point out, however, that the act of production would be deemed that of the corporation, not the individual, and the government could make no evidentiary use of the "individual act" of production. Id.

The difficulty here is that, unlike in Braswell, King has not been served with process or a request indicating that King was to respond in his capacity as a custodian and, to the contrary, King has been served with a request addressed to him individually. Thus, as King is being asked to respond individually, the privilege is therefore applicable.

C. WAIVER

The NCUA argues that King has waived his fifth amendment privilege because of the testimony that he gave when he was deposed a second time. During that deposition, King indicated that he was aware of his fifth amendment privilege and at that time had no objection to the NCUA lawyer examining documents in the hands of Erickson & Sederstrom. This waiver argument must fail for a number of reasons.

First, even if King had voluntarily waived the fifth amendment privilege during the deposition, he subsequently withdrew the waiver before it was ever acted upon. The NCUA does not cite any

precedent, and I can find none, which suggests that King is precluded from withdrawing his waiver, particularly in the absence of some type of prejudice to the NCUA.

Second, the waiver was not effective. This court must "'indulge every reasonable presumption against waiver' of fundamental constitutional rights" and should "'not presume acquiescence in the loss of fundamental rights.'" Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (footnotes omitted) (quoting Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937); Hodges v. Easton, 106 U.S. 408, 412 (1882); Ohio Bell Tel. Co. v. Public Utils. Comm'n, 301 U.S. 292, 307 (1937)). The waiver occurred when King did not have counsel and before the indictment had been handed up by the grand jury in the criminal case. Moreover, the waiver relates to a large number of documents which were not in the hands of King at the time he tendered the waiver. Indeed, the waiver probably related to some documents which King might not have even seen, such as a memorandum of his previous counsel reciting a conference which counsel had with King (e.g., Filing 158, Def's Sealed Exh. 14, item 16).

I conclude that King withdrew his waiver before it was acted upon and that the waiver was not voluntary, knowing, or intelligent under the circumstances.

D. PREVIOUSLY IDENTIFIED

The NCUA argues that the possession, existence, and authenticity of the documents are a foregone conclusion because Erickson & Sederstrom, when asserting the attorney-client

privilege, identified certain documents in a letter dated April 20, 1989 (filing 141, Attachment, Exh. 3) from Erickson & Sederstrom to counsel for the NCUA.[9] Thus, the NCUA contends that possession, existence and authenticity were foregone conclusions. See United States v. Doe, 465 U.S. at 614 n.13; Fisher, 425 U.S. at 411. Basically, the NCUA argues that the act of producing and identifying the documents cannot be testimonial for fifth amendment purposes since the NCUA already knows of the existence of the documents.

I am not persuaded by this argument because at the time Erickson & Sederstrom asserted the attorney-client privilege in April of 1989 and purported to identify the documents Erickson & Sederstrom was not King's counsel, as the firm had been allowed to withdraw in March of 1989. Thus, the identification, for fifth amendment purposes, was not made by King or any agent authorized to, in effect, admit the existence, possession or authenticity of documents for fifth amendment purposes. This is particularly true because at the time Erickson & Sederstrom wrote the letter King had not yet been indicted.

If King were compelled to respond to the requests to produce or answer the interrogatory, King would be compelled to admit the truth of the Erickson & Sederstrom identification--he would be both

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[9]NCUA suggests that Erickson & Sederstrom also may have identified documents at the records deposition in February of 1989 when Erickson & Sederstrom was King's counsel. I have read the deposition transcript, and I find no explicit identification. Moreover, Erickson & Sederstrom made clear that it did not represent King at that records deposition and King was not present or represented (Filing 141, Attachment, Exh. 2, 4:1-8; 5:25-6:8).

explicitly and implicitly making a statement as to the existence of these documents. This King cannot be compelled to do. See Doe v. United States, 56 U.S.L.W. at 4712. Moreover, King is essentially asked in the first request to produce to confirm the accuracy of the Erickson & Sederstrom identification, and this request would require, if this court were to grant the NCUA's motion, King and his court-appointed counsel to use any knowledge they might have to confirm the accuracy of a third party's identification of documents. Once again, King cannot be compelled to use his knowledge, as this is a testimonial act. See id. Moreover, Nebraska evidence law makes clear that a privilege is not lost when the disclosure itself is privileged, Neb. Rev. Stat. § 27-511 (Reissue 1985), or where the disclosure was made without an opportunity to claim the privilege. Id. § 27-512(2). In this case there is no evidence that King authorized the disclosure for fifth amendment purposes, and King had very little meaningful opportunity to contest the disclosure for fifth amendment purposes because he had not yet been indicted and he was without counsel.

I conclude therefore that to require King to confirm the accuracy of the Erickson & Sederstrom identification would be to require an act of testimonial significance for fifth amendment purposes.

E. PROTECTIVE ORDER

The NCUA argues that this court can protect King by entering a protective order keeping any compelled response secret from the Justice Department. This requires King to exchange his

constitutional right against self-incrimination for a court order that is not binding upon the United States of America as plaintiff in the criminal case. In my view King has an absolute constitutional right to rely upon his fifth amendment privilege or to have the functional equivalent of immunity as to the use of the compelled response. See United States v. Doe, 465 U.S at 614-16; Kastigar v. United States, 406 U.S. 441, 443-47 (1972). In essence, a protective order must leave King "in substantially the same position as if [he] had claimed the Fifth Amendment privilege." Kastigar, 406 U.S. at 462.

A protective order is a problematic device for providing King with the equivalent of use immunity. Indeed, a treatise writer has stated that "whether the court, in a civil action, can provide protection equivalent to an immunity statute, as is needed if the claim of privilege is to be overcome, seems doubtful." 8 C. Wright and A. Miller, Federal Practice and Procedure § 2018, at 153 (1970) (footnote omitted). See Dienstag v. Bronsen, 49 F.R.D. 327, 329 (S.D.N.Y. 1970) (stating that the defendant's fifth amendment rights would be jeopardized even if civil discovery were conducted pursuant to a confidentiality order, while the defendant was preparing the defense of a related criminal action). In this case, there are real, practical problems with a protective order.

The NCUA is an independent agency in the executive branch of the United States of America. 12 U.S.C. § 1752a(a). Accountants for the NCUA are working closely with the Justice Department in the prosecution of the King criminal case. Although I do not question

for a moment the integrity of counsel for the NCUA, even if I were to restrict disclosure of documents to counsel for the NCUA the close working relationship in the criminal case of the NCUA's accountants with the Justice Department suggests that even inadvertent disclosure to the NCUA's own accountants would almost certainly cause the documents or their contents to fall into the hands of the Justice Department. In this connection, I note that at least some of the documents would probably require the assistance of accountants to fully understand the documents (e.g., Filing 158, Def's Sealed Exh. 14), items 140-144).

As indicated above, the NCUA is an independent agency in the executive branch of the United States. 12 U.S.C. § 1752a(a). Counsel for the NCUA suggests that I cannot lawfully stay discovery in this case because of the provisions of the statutes applicable to the NCUA which forbid a court to "restrain or affect the exercise of powers or functions of a liquidating agent" which in this case is the NCUA. Id. § 1787(a)(1)(B). The NCUA, however, apparently concedes that I have some authority to enter a protective order. The NCUA suggested at one of the oral arguments in this case that it wanted the documents from King for, among other purposes, to know whether it should commence other civil litigation. I have contemplated requiring the NCUA to accept any documents with the proviso that the NCUA do nothing with the documents until the King criminal trial is completed and any appeal concluded. If such an order or a similar order restricting use of

the documents would be entered, a serious question is raised as to the validity of such an order under 12 U.S.C. § 1787(a)(1)(B).

For example, and purely hypothetically, if the NCUA received a document from King showing the existence of a an asset in the possession of a third party allegedly belonging to Franklin, could this court impose a protective order stopping the NCUA from using the document at a trial or hearing held for the purpose of obtaining the asset from the third party, at least until such time as King's criminal trial, and any appeal, is concluded? The NCUA's brief seems to suggest that the NCUA would resist such an order by contending that such a stay violates the "no restraint" provisions of the statutes governing the NCUA. Brief in Opposition to the Motion for Stay and Motion for Protective Order at 4-5. This then puts King in the position of being potentially subject to additional litigation implicating King's fifth amendment privilege.

As a consequence of the foregoing, I conclude that a protective order will not provide King with the functional equivalent of use immunity. King is not required to accept the risk that his fifth amendment privilege will be compromised; rather, King is entitled to a reasonable guarantee that his privilege will be honored, and this the court cannot provide.

IT IS ORDERED:

1. The motion to compel (filing 141, CV 88-0-819) is denied in part as to all exhibits (filing 158) with respect to which King has claimed the fifth amendment privilege;

2. The motion for a protective order (filing 137, CV 88-0-819) is granted in part as provided herein:

a. the NCUA shall not seek by way of deposition or other discovery device to obtain from King, in his individual capacity, or King's court-appointed lawyers either the exhibits (filing 158) or the contents of the exhibits for which King has claimed the fifth amendment privilege;

b. in asserting the attorney-client privilege or work-product doctrine, King need not provide the NCUA (but he shall provide the court for in camera ex parte consideration) with a particularized listing of documents for which such claims are asserted if to do so would be to particularly identify a document for which the fifth amendment privilege claim has been sustained;

c. inasmuch as it appears that Erickson & Sederstrom no longer has any documents, the protective order as to that firm is denied as moot;

3. The balance of the issues having to do with Federal Rule of Criminal Procedure 16, the request for a complete stay of discovery, the attorney-client privilege and work-product doctrine claims shall be resolved at a subsequent hearing;

4. For purposes of appeal, this order is considered final by the undersigned.

DATED this 13th day of December, 1989.

BY THE COURT:

Richard G. Kopf
United States Magistrate

IN THE UNITED STATES DISTRICT COURT
For the District of Nebraska

UNITED STATES OF AMERICA, Plaintiff, vs. LAWRENCE E. KING, JR. and ALICE PLOCHE KING, Defendants.	)	CASE NO. CR89-0-63 AFFIDAVIT OF STEVEN E. ACHELPOHL

STATE OF NEBRASKA)
) ss
COUNTY OF DOUGLAS)

STEVEN E. ACHELPOHL, being first duly sworn upon oath states and deposes as follows:

1. Affiant is the Court-appointed counsel for the Defendant Lawrence E. King, Jr., and began preparation of a defense in this proceeding shortly after the Indictment was returned on May 19, 1989.

2. A great deal of time is being consumed determining what persons are material witnesses in this case and what persons have no relevant information. The government has denied the request of defense counsel for access to statements of witnesses, except those of the Defendant Lawrence E. King, Jr., and certain other statements which have been ordered produced by the Court.

3. The accounting firm employed by the government began its reconstruction work in this case on December 14, 1988. Defense counsel believes that it is necessary to an adequate defense that a sufficient amount of time be provided to defense counsel and their accountants to review and analyze the work of the government accountants after it has been finalized. Further, there is a substantial period of time involved in the Indictment, 1976 through 1983, for which no reconstruction work has been accomplished by the government's accountants. Defense counsel anticipates that he may require accounting work with respect to this time period in order to adequately prepare for defense of the charges contained in the Indictment.

4. The investigation on behalf of the Defendant in this case has been delayed by proceedings in the civil case, National Credit Union Administration Board v. King, CV88-0-819, as a consequence of the request by the NCUAB for production of the records of the Defendant's former lawyers, Erickson & Sederstrom. These proceedings are a matter of record in the civil case.

5. Defense counsel represents to the Court that an additional period of sixty (60) days is reasonable and necessary to the investigation and defense of this case.

FURTHER AFFIANT SAYETH NOT.

Steven E. Achelpohl

SUBSCRIBED AND SWORN to before me this 10th day of January, 1990.

GENERAL NOTARY-State of Nebraska
DEBORAH T. WALLACE
My Comm. Exp. May 11, 1993

Notary Public

IN THE UNITED STATES DISTRICT COURT
For the District of Nebraska

UNITED STATES OF AMERICA, Plaintiff, vs. LAWRENCE E. KING, JR. and ALICE PLOCHE KING, Defendants.	)	CASE NO. CR89-0-63 AFFIDAVIT OF LAWRENCE E. KING

STATE OF NEBRASKA)
) ss
COUNTY OF DOUGLAS)

LAWRENCE E. KING,, Jr., being first duly sworn upon oath states and deposes as follows:

1. Affiant is one of the Defendants in the above-styled matter.

2. My attorneys, Steven E. Achelpohl and Marilyn N. Abbott, have explained to me in detail my rights under the Speedy Trial Act, 18 U.S.C. §3161.

3. Because of the complexity of the case filed against me and because of the voluminous amount of documentary evidence that is expected to be introduced by both parties it is necessary for me to waive my right to a speedy trial in the interest of being adequately prepared to go to trial and present my defense.

4. I will be requesting a third enlargement of time in order for me to accomplish discovery and to prepare my defense. I understand that the following extension of scheduling deadlines is being requested on my behalf:

a) to April 1, 1990 for discovery;

b) to May 15, 1990 for filing pretrial motions; and

c) to June 1, 1990 for trial.

5. I am making this waiver of my rights under the Speedy Trial Act knowingly, intentionally and voluntarily free of any duress and I further state that no threats or promises have been made to me in order to induce me to waive my rights.

6. It is my belief that this waiver of a speedy trial is in

my best interests and that it is in the ends of justice to grant me this additional time and that to do so would outweigh both my interest and the interest of the public in a speedy trial.

7. I further understand that the additional time granted to me to prepare for trial would be considered excludable time in any future computation of time under the requirements of the Speedy Trial Act.

FURTHER AFFIANT SAYETH NOT.

Lawrence E. King, Jr.

SUBSCRIBED AND SWORN to before me this 10th day of January, 1990.

GENERAL NOTARY-State of Nebraska
DEBORAH T. WALLACE
My Comm. Exp. May 11, 1993

Deborah T. Wallace
Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA) CR 89-0-63

Plaintiff(s)

vs.

LAWRENCE E. KING, JR.

ALICE PLOCHE KING

Defendant(s)

ORDER

FILED
DISTRICT OF NEBRASKA
AT ____ M
JAN 11 1990
Norbert H. Ebel, Clerk
By ____ Deputy

IT IS ORDERED that Defendant-Alice King's Motion for Inspection purusant to F.R. Crim P. 16 (filing #130) and Defendant-Lawrence King's Mot for Ext of Time Limits, Pre-Trial Motions & Trial (filing #131) is set for oral argument and evidentiary hearing, if necessary, before the undersigned, in Room 8325 Federal Building (8th Floor), 215 North 17th Street, Omaha, Nebraska, on the 19th day of January, 1990, at 10:00 a.m. If this is a criminal case, the Defendant shall be present, unless excused by the Court.

DATED this 11th day of January, 1990.

BY THE COURT:

Richard G. Kopf
United States Magistrate

147A-571-652

SEARCHED ____ INDEXED ____
SERIALIZED ____ FILED ____
JAN 11 1990
FBI — OMAHA

Memorandum

To : SAC, OMAHA (147A-571) (P) Date 1/9/90

From : SA [redacted]

b6
b7C

Subject: [redacted]
PRESIDENT,
FRANKLIN COMMUNITY FEDERAL CREDIT UNION (FCFCU),
1723 NORTH 33RD STREET,
OMAHA, NEBRASKA;
CONSUMER SERVICES ORGANIZATION (CSO),
OMAHA, NEBRASKA;
[redacted] ACCOUNTANT,
[redacted]
DEVELOPMENT OFFICERS AT FCFCU,
BF&E, FAG-HUD, IRS, MF, WF
OO:OMAHA

For information of the SAC, the above matter is a joint investigation with the INTERNAL REVENUE SERVICE (IRS) and the FEDERAL BUREAU OF INVESTIGATION (FBI). On September 28, 1987, the above investigation was instituted upon receipt of information from a confidential source regarding fraud and embezzlement by officials of the FRANKLIN COMMUNITY FEDERAL CREDIT UNION and a related non-profit entity which have received technical assistance grants and Housing and Urban Development funds in the total amount of $300,000. Investigation has determined HUD funds and technical assistance grants were provided to the CONSUMER SERVICES ORGANIZATION which is a non-profit organization located at the same address as FCFCU. FCFCU was operated by [redacted] Manager. [redacted] was also the President of CSO. It was alleged that [redacted] was using CSO and FCFCU funds which include technical assistance grants and other federal funds for his own personal gain.

2 - Omaha
MAM:sa

147A-571-653

[redacted] was a prominent black businessman within the Omaha metropolitan area. FCFCU and CSO were high visibility institutions in Omaha's minority community. In addition, [redacted] wass prominent within the Republican Party locally and reportedly, sang the National Athem at the Inauguration in 1984 for President RONALD REAGAN. Additionally, [redacted] attended the Republican Convention in 1988 that nominated Vice-President GEORGE BUSH as its Republican candidate for the President of the United States. b6 b7C

Interview of present and past employees, as well as several of [redacted] associates revealed that although [redacted] was reportedly officially paid only $30,000 as Manager by FCFCU and $1.00 by CSO, he has used FCFCU and/or CSO funds to finance an extravagant lifestyle for him and his associates.

Investigation determined numerous instances of large expenditures by [redacted] in this regard. These include: purchase of CAFE CARNAVALE RESTAURANT in Omaha, purchase of ALLEN SHOWCASE NIGHTCLUB in Omaha, purchase of $23,000 chandelier for his personal residence, several six month to one year leases of apartments for associates and furniture for at least one apartment which reportedly cost $45,000, several trips for [redacted] and his associates and family throughout the United States and Jamaica, several parties costing as much as $7,000 - $8,000.

Investigation determined that in addition to the federal funds and grants, CSO is in receipt of grants from non-profit organizations and foundations throughout the United States. Investigation determined several million dollars were received by CSO in the form of grants and foundations monies. Upon attempted verification of those funds, investigators determined many of the declarations of monies received as grants from the non-profit organizations and foundations throughout the United States were forgeries.

In addition, investigation determined that CSO employs individuals to sell certificates of deposit on behalf of FCFCU. Interview of those employees has determined that as of October, 1988, approximately fifteen million dollars in certificates of deposit have been sold by those employees on behalf of FCFCU. The sale of those certificates of deposits was not reflected in any financial statement prepared by FCFCU and submitted to the NATIONAL CREDIT UNION ADMINISTRATION (NCUA), which is the overseer of credit unions throughout the United States. The NCUA, as of August 31, 1988, was aware of only 1.5 million

dollars in certificates of deposits being reflected on FCFCU's balance report. Further, NCUA officials advised that heretofore they believed that FCFCU was solvent, but only because of grants it was purportedly receiving from CSO.

On October 28, 1988, a review of FCFCU's report to the NCUA regarding purchases of certificates of deposits was compared with a sales record maintained by the employees of CSO responsible for the sale of certificates of deposit. Those employees' records reflected sales to individuals not reported to the NCUA as of August 31, 1988. At the time an additional fourteen million dollars of certificates of deposit sales were being diverted to CSO. These funds, as well as the federal funds, are believed to have been co-mingled with other CSO funds in a pool which subject [redacted] has allegedly used for personal benefit and gain. b6 b7C

An affidavit was prepared for search warrants of FCFCU and CSO. On November 4, 1988, the search warrant was executed at FCFCU and CSO. On this date, FCFCU was taken into receivership by NCUA and closed.

After the close of FCFCU, agreements between United States Attorney's Office, [redacted] FCFCU Accountant and [redacted] were reached resulting in their cooperation and eventual testimony regarding this matter.

In January, 1989, NCUA hired FINANCIAL ADVISORY GROUP, LTD., a private accounting firm to recreate the FCFCU records.

On May 19, 1989, [redacted] and [redacted] were indicted by a Federal Grand Jury, District of Nebraska, on 40 counts of violation Title 18, United States Code, Sections 371, 657, 1006, 1341, 1343, 1344, and Title 26, United States Code, Section 1206.

Since the indictment of [redacted] court appointed counsel was appointed for [redacted] PEAT, MARWICK, INC., accounting, was hired to review the accounting work of FINANCIAL ADVISORY GROUP, LTD. Currently [redacted] attorneys are involved in reviewing evidence in this matter.

Additional allegations regarding [redacted] have been made since the initiation of the investigation. Allegedly, [redacted] was involved in the use and purchase of cocaine, abuse and transportation of children for prostitution. Allegations were general in nature some were made by certain witnesses in the White Collar Crime investigation. Others were made in the press by certain members of the Nebraska State Legislature. Nebraska State Legislature formed a committee to investigate these allegations.

A task force including the FBI, NEBRASKA STATE PATROL and OMAHA POLICE DEPARTMENT conducted the investigation. Attached is a report revealing the results of this investigation.

STATE OF NEBRASKA

NEBRASKA STATE PATROL

KAY A. ORR
GOVERNOR

H. W. LEGRANDE
SUPERINTENDENT

February 17, 1989

Mr. Robert Spire
Nebraska Attorney General
P.O. Box 98920
Lincoln, NE 68509-4906

Dear Mr. Spire:

A joint Nebraska State Patrol and FBI criminal investigation was initiated upon receipt of allegations that children who are or have been wards of the State of Nebraska were victims of various forms of abuse both within the State of Nebraska and other jurisdictions in the United States.

The initial abuse allegations involve the following:

1. Occult practices where human sacrifices, homicides, drugs, pornography and child sexual abuse occurred.

2. Child pornography and prostitution of several children who had lived in the foster home of [redacted] and [redacted] and under aged males from Boys Town, who in Nebraska and other U.S. localities were induced into immoral sexual activities. b6 b7C

3. Child sexual and physical abuse of children who were or are wards of the state.

4. Previous death investigations ruled as suicides could possibly be related to involvement by [redacted] b6 b7C

5. Possible drug activities relating to these allegations.

[redacted], former head of Franklin Community Federal Credit Union (FCFCU), was named as being directly or indirectly involved in the above described activity.

[redacted] director, and [redacted] vice chairman, Nebraska State Foster Care Review Board, provided Nebraska State Patrol and FBI with records which contained allegations of child abuse which had been received from individuals involved with state child care services, employees (child care attendants) of Richard Young Psychiatric Hospital, Boys Town and Uta Halee Home for Girls who had direct involvement with the victims.

At the request of the Nebraska Attorney General's Office, Nebraska State Patrol assisted by the FBI, due to the possible interstate aspects, conducted a criminal investigation. The main investigative thrust centered on locating and interviewing alleged victims and or witnesses to verify, document and establish facts (if such exist) upon which prosecution action could be based if the allegations were in fact accurate.

Three alleged victims who reportedly were knowledgeable and involved in the occult, pornography, drugs and sexual abuse were interviewed at length. None of these individuals could provide verifiable information as to locations, individual involvement or substantial facts. One victim, a [redacted] year-old black female

resident at Richard Young Psychiatric Hospital described involvement with the occult beginning at age [redacted] This involvement included drugs, sex, pornography, human sacrifice of a mixed race small girl and the homicide of a young white male. b6 b7C

Victim claims to have gotten out of the occult by not answering the phone. Victim states all occult activity ceased after placement in Immanuel Mental Health Center, 1985, at the age of [redacted] where she was given prescribed medication. Victim was unable to provide names or locations regarding occult, due to involvement with drugs and alcohol.

Victim claims to have been raped at age [redacted] The rape was reported to Omaha Police Division (OPD) nine months after the event, even though victim had been interviewed by OPD when victim's mother reported being raped by the same person, at or about the same time as victim.

Victim claims if [redacted] was killed, they could set the children free. Victim has seen [redacted] on two occasions at parties. Victim advised [redacted] was present for a short period of time and that no sex or pornography was observed. Victim states involvement in pornography as a model utilized by older men through the Omaha Girls' Club, but could not provide names or locations where activities took place other than the activity occurring during the same time frame as victim's involvement with the occult. Victim claimed that while at the Uta Halee Girls Home, victim read an occult book which was taken from a administrative office.

The second victim, a white female, age [redacted] claimed no knowledge or involvement with the occult, pornography or sexual abuse. Victim states first awareness of these activities occurred when told about them by a child care attendant. Victim claims to have met [redacted] through victim's father and states no pornography or sexual abuse was observed nor was victim molested. Victim advised to having been raped at age [redacted] by a black male and the rape was not reported by her family.

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Victim number three, a black female, age [redacted] states while in the 8th grade, along with four or five other teenagers, held parties where satanic symbols were present, marijuana smoked and alcohol used. Victim advised no sexual or pornographic activities took place at these parties. Victim states a brother molested her from the time victim was [redacted] years old. At age [redacted] victim was hospitalized at St. Joseph Hospital because of suicidal tendencies. Victim was subsequently placed in Uta Halee Girls Home where she met victim's one, two and a child care attendant. Victim stated that victim #1 would freak out a lot and over dramatize things. Victim advised all information regarding [redacted] was learned through these associations with the child care attendant and other victims. Victim states recent involvement with a member of the Rolling 60's Crip gang and believes the gang member to be a drug dealer. She further believes this gang member may know [redacted] and because of [redacted] money, she is suspicious that [redacted] may be involved with the gang member in this. However, victim could

provide no facts or further details about this allegation. All three victims as noted above were unable to provide any information that [redacted] was involved with occult practices, pornography, drugs or sexual abuse. b6 b7C

The major source of child physical and sexual abuse allegations arise from adopted children previously placed in the home of [redacted] Washington County, Nebraska. One adopted child, age [redacted] claimed to have suffered beatings by [redacted] observed a Playboy-type magazine and attended family-type functions at the home of [redacted] This child did not observe any pornography or sexual activities at home or at [redacted] home, nor did the child travel with [redacted]

Another adopted child, age [redacted] states [redacted] beat her and other children in the home with a rubber hose and a railroad prod and claims that on occasion, children were beaten while naked. Child claims no knowledge of sexual abuse in [redacted] home or the home of [redacted] Child states all parties attended at [redacted] home by her were family fun-type gatherings. This child did not travel with [redacted]

A third adoptive child claims to have been physically and sexually molested while in [redacted] home. She also alleges that [redacted] transported her, prostitutes and teenage males from Boys Town to Chicago and New York for immoral purposes (subsequent interviews of individuals identified by this child fail to verify any information and contradicted statements made by the adoptive child). The third adopted child

further claimed that adoptive parents were involved with pornography, that they would receive pornography shipment via UPS and would transport pornography to school. Child states information provided by a child care attendant indicated that female students were forced to sleep with a school principal to pass. Adopted child agreed to furnish a written report of activities at the Omaha Girls' Club and submit to a polygraph exam. This child subsequently has refused to furnish the written report or submit to a polygraph exam.

Both adopted parents of the aforementioned children denied all allegations of physical and sexual abuse. Parents admitted to having sexual material sealed in a closet which the children got into and X rated videos which they, the parents, viewed in private. Parents claim they were strict, that they spanked and withheld privileges from children for disobedience. Parent denied any travel by children with [redacted] Parents claim adoptive children want to go their own way and do their own thing. This coupled with all the nasty allegations made against them was their reason for relinquishing control of the children. A child abuse investigation relating to children in [redacted] home was conducted by the Washington County Sheriff's Office 1985-1986. One of the adoptive children was polygraphed by the Nebraska State Patrol on the physical and sexual abuse which allegedly had occurred in [redacted] home. The Nebraska State Patrol polygraph examiner administered one test, which consisted of four polygrams or charts. Polygraph examiner indicated these test results were truthful. The polygraph

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consisted of several questions that were relevant to the child's statement and allegation of child and sexual abuse against [redacted] Throughout the child abuse investigation in 1985-1986, there was no mention of pornographic activity nor was [redacted] mentioned during interviews conducted by NSP investigators. Findings were presented to the Washington County Prosecutor's Office for criminal charges. Prior to charges being filed, [redacted] relinquished custody of the children involved in the physical and sexual abuse.

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Allegations pertaining to residents and employees of Boys Town were to the effect that young black male residents of Boys Town were being transported by [redacted] to various cities throughout the United States for immoral purposes.

Follow-up investigation identified and located these previous residents of Boys Town who had been mentioned in notes provided by a past employee of Boys Town. Interviews of these alleged victims and/or witnesses revealed no information or facts that would support allegations of pornographic activity or child abuse of Boys Town residents by [redacted] One witness was interviewed and confirmed that he had lived with [redacted] for a period of time after graduating from Boys Town. This same witness advised that he did accompany [redacted] on trips to various cities throughout the United States, but had not participated or observed any pornographic activity or child abuse. Further, this witness

directly contradicts previously noted allegations by adopted child #3 that this witness was present during a trip to Chicago during September or October, 1984 where illicit sexual activity occurred.

Adopted child #3 had alleged that this witness accompanied her and [redacted] to Chicago, Illinois. This witness advised, however, during his interview that this adopted child never traveled with him and [redacted] The witness further advised that in September and October of 1984 he was serving in the U.S. Navy at that time and did not attend a party with [redacted] This same witness did state that he had received homosexual advances by [redacted] during his tenure with [redacted] and this resulted in the witness leaving the Omaha area, but it is noted that the witness turned [redacted] shortly after moving in with [redacted] The witness advised that he had no knowledge and never observed any pornographic or child abuse activity during his tenure with [redacted]

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Allegations concerning death investigations were received by the Nebraska Attorney General's Office. These allegations indicated that the deaths, which have been ruled as suicide, may have been organized or directed by [redacted] The first death investigation referred to Curtis D. Tucker, BM, DOB: 2-14-59. On December 25, 1985, Tucker jumped from the 9th floor window of the Ramada Inn at 72nd & Grover St. in Omaha, NE. All witnesses interviewed at the scene indicated that there was no foul play. Follow-up interviews with a priest who was a close

associate of Tucker advised that Tucker's death was a suicide. According to the priest, Tucker had been counseled by the priest in regards to a relationship TUCKER was having with a white female. The priest advised that the relationship was terminated by the girl for racial reasons. In the suicide note Tucker left, indicates that Tucker committed suicide due to personal and racial problems. Tucker's death was ruled a suicide by the Omaha Police Division.

The second death investigation concerned Charles Rogers, WM, DOB: 6-12-57. On November 10, 1986, Rogers died from a self-inflicted gunshot wound. Follow-up interviews conducted with family members and close associates indicated Rogers was homosexual and may have been having a homosexual relationship with [redacted] Follow-up interviews with the lover and roommate of Rogers, advised that Rogers was despondent over Rogers' relationship with his roommate. Evidence gathered at the death scene and during the autopsy of Rogers was examined by the Douglas County Sheriff's Department and Rogers' death was ruled a suicide.

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Follow-up investigation and interviews conducted, relating to the aforementioned suicides, indicate there was no foul play involved with either of these deaths.

[redacted] when interviewed, denied child abuse, drugs and pornography activity, occult practices, transporting of juveniles, including residents of Boys Town interstate for immoral purposes, stating he was strongly against such activities. [redacted] denied allegations of transporting

adoptive nieces interstate or anywhere. Further, [redacted] denied any involvement with the death of Charles Rogers and claims he doesn't know [redacted] believes allegations are a result of his race, political and community influence and the fact he had money. b6 b7C

During the investigation into child abuse, child pornography, suicides/homicides and sexual assault, previous investigative reports from various law enforcement agencies were acquired. Reports were also obtained from the Nebraska Attorney General's Office and the Nebraska Foster Care Review Board. The Nebraska Attorney General's Office provided interview reports of the initial interviews of persons making the alleged allegations. Foster Care Review Board provided investigators with copies of reports submitted to their agency in which allegations of illicit activity were documented. Omaha police provided death investigation reports of Curtis Tucker, their investigation into alleged cult activity and their investigative reports of alleged sexual assault of one of the victims/witness and the sexual assault of the mother of the victim/witness. Douglas County Sheriff's Department provided their death investigation reports on Charles Rogers. Washington County Sheriff's Department provided reports of their investigation into allegations of child abuse at the [redacted] residence.

Interviews and follow-up contacts with individuals knowledgeable of allegations as original set forth at the outset of this investigation have failed to add substance, facts or additional allegations relating to this matter.

In addition to the above, in excess of 50 individuals who were interviewed pursuant to this aspect of the FCFCU investigation and/or as part of the separate on-going aspect of the FCFCU investigation into financial irregularities at FCFCU, were specifically asked if they had any knowledge regarding whether [redacted] or other associates with FCFCU were involved in illegal vice type activities, namely child sexual abuse, pornography, prostitution or narcotics. These persons were questioned about this particular subject because they were known to or believed to have a personal association with [redacted] or an association with person who might have knowledge of such activities.

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Another group of at least 50 individuals, who were known or believed to have a non-personal association with FCFCU or persons involved with FCFCU were interviewed and asked if they had information regarding involvement of [redacted] or others associated with FCFCU in any illegal activities.

Virtually, all these individuals in both groups advised they do not have any information regarding involvement of [redacted] or others associated with FCFCU in vice-type criminal activity other than homosexual activity between consenting adults, which was acknowledged by at least four persons.

During the course of this investigation only one individual, namely the aforementioned adoptive child #3, made allegations that [redacted] had been involved in child sexual abuse, pornography, prostitution or drugs. Investigation has failed to substantiate these allegations.

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Sincerely,

[redacted]

Investigator
Nebraska State Patrol
4411 So. 108 Street
Omaha, NE 68137

cc: [redacted]
FBI Supervisory Agent [redacted]
[redacted]
Lincoln
Omaha 4006-30437

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA, Plaintiff, vs. LAWRENCE E KING, JR AND ALICE PLOCHE KING, Defendants.	)	CR 89-0-63 O R D E R

JAN 22 1990
Clerk
By Deputy

This case is before the magistrate pursuant to 28 U.S.C. Section 636 to consider the defendant Lawrence E. King's motion (filing 131) for continuance. A hearing was held on the motion on January 19, 1990. At that hearing the defendant Alice Ploche King joined in the motion for continuance. All defendants consent that any extra time be excluded for speedy trial computation purposes.

IT IS ORDERED:

1. The motion (filing 131) is granted as provided herein, but is otherwise denied;

2. Trial of this matter is continued until on or after June 4, 1990;

3. To the extent possible, all pretrial motions shall be filed by March 15, 1990;

4. If it is not possible to file a particular pretrial motion by March 15, 1990, then defendants' may file other pretrial motions by April 15, 1990, providing they show good cause for the late filing of such motions when the motions are filed;

5. A pretrial conference, at which all counsel and the defendants shall be present, shall be held on March 19, 1990, at

Serial 654

1:30 p.m. before the undersigned at which time the parties shall be expected to state their respective positions as to: what further motions will be required; when hearings on motions should be scheduled; estimates of the length of trial; expected evidentiary problems at the time of trial and methods for resolving those problems prior to trial; stipulations of fact; and ways and means of expediting trial. Prior to the pretrial conference, counsel for the parties shall meet and endeavor to arrive at an agreed pretrial conference statement for presentation to the undersigned regarding the items mentioned above, as well as the items mentioned in Federal Rule of Criminal Procedure 17.1, Federal Rule of Civil Procedure 16, and Local Rule of Practice 25. The parties shall present the agreed pretrial statement to the undersigned at the time of the conference. If the parties cannot agree as to a pretrial conference statement each side shall prepare a suggested statement and present the same to the undersigned at the conference (understanding that no such statement shall be binding upon a party until adopted pursuant to Federal Rule of Criminal Procedure 17.1);[1]

6. The scheduling provided for in the court's order of September 19, 1989 (filing 76) is not otherwise altered or amended;

7. The ends of justice will be served by granting such a motion, and outweigh the interests of the public and the defendants in a speedy trial, and the additional time arising as

[1] While the court understands that this is a criminal case, many of the same concepts employed in the civil rules regarding pretrial preparation should be considered by the parties given the underlying nature of this case.

a result of the granting of the motion, the time between January 10, 1990 and June 4, 1990, shall be deemed excludable time in any computation of time under the requirement of the Speedy Trial Act, for the reason that defendants' counsel require additional time to adequately prepare the case, taking into consideration due diligence of counsel, the novelty and complexity of this case, and the fact that the failure to grant additional time might result in a miscarriage of justice. 18 U.S.C. Section 3161(h)(8)(A) & (B).

DATED this 22nd day of January, 1990.

BY THE COURT:

Richard G. Kopf
U.S. Magistrate

OM 147A-571
DDM:kls

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The following investigation was conducted by Special Agent [redacted] on December 30, 1989, at Omaha, Nebraska: b6 b7C

[redacted] stated a party was held at the Benedict Club in North Omaha, Omaha, Nebraska. Source stated that [redacted] showed up in a black Marc V Lincoln bearing Nebraska license [redacted] was wearing a trench coat with a mink collar and a two to three carat broach on the coat. [redacted] had two diamond rings on each hand which consisted of a diamond pinkie ring on each hand. Source stated that [redacted] wife had a full-length mink coat on and [redacted] associated with almost everyone at the party with the exception of [redacted]

Source stated that [redacted] left the party in an old Ford bearing Nebraska license [redacted]

A check of the Nebraska vehicle records showed that Nebraska registration [redacted] is a 1977 Marc V two-door Lincoln registered to a [redacted] Omaha, Nebraska.

A check of the Nebraska Vehicle Registration showed that Nebraska license [redacted] is a 1978 Chevrolet four-door registered to [redacted] Omaha, Nebraska.

147A-571-655

Nebraska State Legislature

[redacted]

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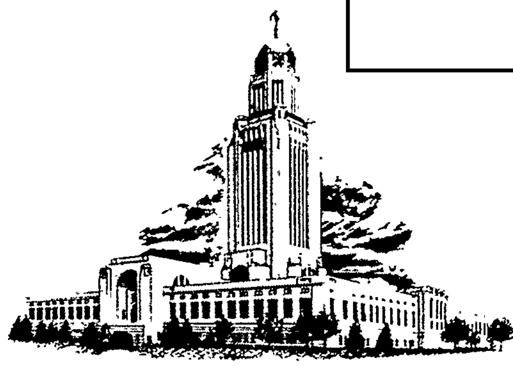

SENATOR LORAN SCHMIT

District No. 23
State Capitol
Lincoln, Nebraska 68509
(402) 471-2719

Box 109
Bellwood, Nebraska 68624

COMMITTEES

Chairman, Natural Resources
Banking, Commerce and Insurance
Executive Board
Reference
Legislative Council

Ninety-First Legislature

January 26, 1990

SAC Charles Lontor
Federal Bureau of Investigation
215 N. 17th. Street
Omaha, Nebraska 68102

Dear Mr. Lontor:

Would you please provide a detailed accounting of the number of man hours, expenses advanced and salaries paid for your departments investigation of Franklin Savings and Loan prior to Febuary 1989?

Sincerely,

Loran Schmit
State Senator

LS/lb

D - make cc for 147 file also & write T: # u + CA [redacted] & high-light for Them my note below. J.

147-571-656

ASAC —

[redacted]

[redacted]

No response is to be made to this request. J.

SEARCHED ___ INDEXED ___
SERIALIZED ___ FILED ___
JAN 29 1990
FBI-OMAHA

FD-302 (REV. 3-10-82)

FEDERAL BUREAU OF INVESTIGATION

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Date of transcription 1/26/90

[redacted] BERKSHIRE HATHAWAY, INCORPORATED, 1440 Kiewet Plaza, Omaha, Nebraska, telephone number 346-1400, was telephonically interviewed by Special Agent (SA) [redacted] of the FEDERAL BUREAU OF INVESTIGATION (FBI). [redacted] was interviewed regarding FRANKLIN COMMUNITY FEDERAL CREDIT UNION (FCFCU). [redacted] provided the following information:

[redacted] advised a review of his company's records and personal expenditures by himself do not reveal any type of donation or monies being paid to FCFCU or CONSUMER SERVICES ORGANIZATION (CSO). [redacted] advised to the best of his knowledge he was never solicited by employees of FCFCU or CSO to contribute money on behalf of CSO, FCFCU, or the building fund for FCFCU. Further review of BERKSHIRE HATHAWAY stocks do not reveal [redacted] personally owning any BERKSHIRE HATHAWAY stock.

[redacted] advised [redacted] had a social relationship with the [redacted] family approximately 16 years ago at which time [redacted] had requested from [redacted] wife to utilize the [redacted] home in celebration of a wedding anniversary. [redacted] advised his wife agreed to the use of their personal home, however, [redacted] refused to allow them to use their home. [redacted] requested the use of his home while they were attending a party or social gathering at the [redacted] residence. [redacted] advised this residence was not located on River Road, however, he could not recall the exact location of the home.

[redacted] advised to the best of his knowledge [redacted] never requested any funds from [redacted] on behalf of FCFCU, CSO or the building fund for FCFCU.

[redacted] advised he does not know any other principals behind FCFCU and could provide no further information regarding FCFCU or CSO.

Investigation on 1/24/90 at Omaha, Nebraska File # Omaha 147A-571

by SA [redacted] Date dictated [redacted]

This document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaned to your agency; it and its contents are not to be distributed outside your agency.

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[redacted] advised he was instrumental in the establishment of COMMUNITY BANK in the North Omaha area along with two other prominent Omaha residents. Upon its establishment in the North Omaha area, he advised there was some concern by [redacted] or FCFCU about too many banks in the North Omaha area for the numberof residents. [redacted] advised the COMMUNITY BANK was established and continues in existence as of to date.

[redacted] advised he would personally contact his wife regarding any further information that may be available and would immediately contact the FBI if additional information was learned.

FILED
DISTRICT OF NEBRASKA
AT _____ M
JAN 25 1990
Norbert H. Ebel, Clerk
By _____ Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA, Plaintiff,	)	CR89-0-63
vs.	)	**MEMORANDUM AND ORDER**
LAWRENCE E. KING, JR., Defendant.	)	

Counsel for the defendant Lawrence E. King, Jr. has requested, orally, that I clarify certain matters regarding the progression of this case. After telephone consultation with counsel,

IT IS ORDERED:

1. The defendant shall have continued access to the document depository and records at the NCUA offices during the pendency of these proceedings;

2. Defendant shall have until March 1, 1990, to provide their reciprocal discovery to the government.

DATED this 25th day of January, 1990.

BY THE COURT:

Richard G. Kopf
United States Magistrate

147A-571-659

COPY

BRENT M. BLOOM
ATTORNEY AT LAW

1510 LEAVENWORTH STREET
OMAHA, NEBRASKA 68102

TELEPHONE (402) 342-2833
FACSIMILE (402) 346-8037

January 25, 1990

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Mr. [redacted]
U.S. Probation Office
U.S. Courthouse
17th & Capitol Streets
Omaha, Nebraska 68101

RE: U.S. v. [redacted]
Case No. CR 89-0-65

Dear Mr. [redacted]

This letter will serve as the required defendant's statement of offense in the above-referenced matter.

Defendant [redacted] (hereinafter [redacted]) was employed by the Franklin Community Federal Credit Union (hereinafter "FCFCU") from July, 1982 through November 4, 1988 as a development officer. His duties included soliciting sales of share certificates to individuals and organizations.

In addition to a base salary, [redacted] received a commission for the sale of each share certificate, based upon its value and term of investment. He submitted summaries of his certificate sales to the FCFCU accountant, [redacted] who would verify the sales and issue commission checks. The commission checks were issued first quarterly, and later on a monthly basis. Unlike [redacted] payroll checks, however, the commission checks were issued without check stubs detailing withholding information. In addition, [redacted] was not provided with an IRS Form 1099 by FCFCU for any year.

[redacted] duly filed IRS Form 1040 for tax years 1985, 1986 and 1987, and he accurately reported his gross wages, interest income and employee business expenses thereon. Although he was aware of the reporting requirement for his commission income, [redacted] did not report these amounts for tax years 1986 and 1987 on his Form 1040, nor did he file Form 1099. On numerous occasions since 1984, [redacted] had requested the appropriate forms for reporting his commission income from FCFCU's accountant, both verbally and in writing. He was repeatedly told that FCFCU was responsible for the payment of taxes on commissions earned by development officers from the sale of stock certificates, and that he should not worry, as these matters were "taken care of." It is presumed that [redacted] was deliberately misinformed about his tax responsibility because FCFCU may have reported only a portion of the share certificate sales in its financial records. [redacted] was never aware of any illegal or improper diversion of funds.

Serial 660

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[redacted] was aware that there was a potential problem concerning the commission income and discussed his tax situation with a CPA. However, he did not report the income on his personal tax returns because (a) he believed that FCFCU paid taxes on the commissions, and (b) he believed that he had up to three years to amend his income tax returns (this information having been provided in a telephone call to an IRS "800" number).

Throughout the investigation of this matter, including two interviews with federal agents on January 11, 1989 and February 14, 1989, [redacted] has been completely cooperative. He has never denied receiving the subject commission checks, nor has he been untruthful as to any matters involved in ths investigation. From the outset, he has indicated a willingness to pay his outstanding tax liabilities.

If you have any questions about these matters, please do not hesitate to contact me.

Sincerely,

[redacted]

BMB/mk
cc: [redacted]
Asst. U.S. Attorney

FD-302 (REV. 3-10-82)

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 1/29/90

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Omaha, Nebraska, was interviewed by Special Agents (SA) [redacted] of the Federal Bureau of Investigation (FBI) and SA [redacted] of the Internal Revenue Service (IRS), who identified themselves as SAs of their respective agencies. [redacted] was interviewed regarding FRANKLIN COMMUNITY FEDERAL CREDIT UNION (FCFCU). [redacted] provided the following information:

[redacted] advised his Date of Birth (DOB) is [redacted] and his Social Security Number is [redacted]

[redacted]

Investigation on 1/26/90 at Omaha, Nebraska File # OM 147A-571-661

by SA [redacted] Date dictated 1/29/90

This document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaned to your agency; it and its contents are not to be distributed outside your agency.

[redacted]

January 15, 1990

[redacted] b6 b7C

Staff Atorney
National Credit Union Administration
1776 "G" Street
Washington, D.C. 20456

RE: Franklin Community Federal Credit Union
[redacted] Bank records from Douglas County Bank (#1-6270-1)

Dear [redacted]

I have enclosed a detailed list of all of the checks written by the [redacted] between February 20 and October 14, 1989, on their account at Douglas County Bank. However, please note that no checks were written between April 28 and June 25, 1989, a period of approximately two months. The checks themselves do not provide any clue as to why activity ceased, then resumed. It is likely the [redacted] were using their account at Community Bank or some other bank.

I have also enclosed a summary of their checks, showing a total of $38,879.72 spent during the 6 months the account was active. I was amazed to see that almost $15,000 of the total was spent on credit card and loan payments.

Gross deposits during the same period were $49,208.70, with cash backs of $5,700.00 giving a total net deposit of $43,508.70. Two deposit sources require further investigation:

1) Of the total deposits, $20,400.00 came from U.N. Medical Center - Nuclear Radiology [redacted] Omaha NE, in the form of two checks for $10,000.00 each (copies enclosed), and one for $400.00. Furthermore, [redacted] had four accounts at Franklin, numbers 3109, 3634, 4017, and 4852:

#3109: Dates back to at least January 1, 1980; a single CD of $22,526.88 was created on 9-2-82. Interest accumulated through 9-2-84 at which time it was closed and the full amount of $27,212.16 was paid to Ms. [redacted]

#3634: Dates back to at least August 31, 1979. No deposits have been made to the account after 7-30-81, other than accrued interest. Balance at time of

[redacted]

close of Franklin was $22,794.29 which was paid her.

#4017: Account originated on 6-2-80, was closed on 1-1-81 and re-opened on 3-25-82, at which time a CD for $600.00 was purchased. No additional deposits were made other than accrued interest, and NCUA paid her claim in the amount of $1,262.49.

#4852: Opened 9-9-81 with $10,000.00 to purchase a CD. No additional deposits other than interest were made through Franklin's closing. NCUA paid her claim of $18,984.83.

However, Franklin did write a check to (#31000) [redacted] in the amount of $5,000.00 on March 21, 1986. The funds were not taken from any of the above accounts, but from FranklinCorp. #8888. That payment certainly appears improper. So, who is [redacted] Why did she get $5,000.00 from Franklin? Why has she given [redacted] at least $20,400.00? Can her accounts at FirsTier be subpoenaed to determine if there are other funds transferred between [redacted] Franklin, and [redacted]

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The second item for further research is the check for $1,638.30, dated July 17, 1989 from United Group Mutual Funds, and payable to [redacted] (copy enclosed). Is this a secret account holding invested funds? This is the first time we have encountered this Mutual Fund.

Additionally, it was highly unusual for so much currency to be taken in the form of cash back ($5,000.00) in the two [redacted] deposits on August 28 and September 1, 1989. On the other hand, deposits of currency and coin totaled $5,483.30. The largest single currency deposit was for $3,500.00 on October 9, 1989. However, it does not necessarily appear to be related to the cash taken back in the two earlier [redacted] deposits.

In summary, the [redacted] combined income from Social Security, their only regular source of income, was clearly insufficient to support their level of spending. The levels of deposit activity and the amount of money spent by the [redacted] during the six month period appears extraordinarily large in view of their circumstances.

Sincerely,

[redacted]
Principal

RLK/jah
enclosure
cc: [redacted]

SUMMARY OF [redacted] DEPOSITS

DOUGLAS COUNTY BANK
ACCOUNT [redacted]
FEBRUARY-OCTOBER, 1989

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CATEGORY	AMOUNT
Social Security	$8,561.00
Unemployment:	402.00
Opera Omaha:	195.00
Jettie Adams	2,000.00
United Group Mutual Fund:	1,638.30
[redacted]	20,400.00
Currency/Coin	5,483.30
Insurance Claims	1,173.25
[redacted] Account at Community Bk	230.00
Deposits with no photos	2,434.14
Deposits: Bad Film	5,148.83
Miscellaneous	1,542.88
Total Deposits	49,208.70
Less: Cash Back	(5,700.00)
NET DEPOSITS	$43,508.70

— 5,000 out in currency
Net Deposit
7,000
8,000

$5,000 to [redacted] in 1986 or 87 from 8888

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SUMMARY OF [redacted]
DOUGLAS COUNTY BANK
ACCOUNT [redacted]
FEBRUARY-OCTOBER, 1989

CATEGORY	AMOUNT
Antiques/Collectibles	$101.12
Auto Expenses	2,114.41
Loan/Bank Payments	10,231.01
Cash	1,350.00
Church	269.00
Clothes	604.70
Credit Card Payments	4,564.90
[redacted]	150.00
Department Stores	1,474.09
[redacted] Checks to him	700.00
Entertainment	496.06
Furniture	255.29
Groceries	1,080.64
Groceries/Cash	1,075.00
Insurance	610.00
Legal	1,672.30
Magazines	21.00
Maintenance	1,744.30
Medical	2,113.67
Other	2,864.92
Taxes	580.39
Utilities	4,806.92
Total Expenditures	$38,879.72

FD-302 (REV. 3-10-82)

FEDERAL BUREAU OF INVESTIGATION

- 1 -

Date of transcription 2/9/90

[redacted] Financial Advisory Group, Omaha, Nebraska, provided the following information to Special Agent (SA) [redacted] and SA [redacted] INTERNAL REVENUE SERVICE. b6 b7C

[redacted] advised his records reflect the following records were reviewed by PEAT, MARWICK, MAIN and COMPANY, an accounting firm hired by defense attorney [redacted] attorney representing [redacted]

1. The [redacted], and [redacted] account at FIRST NATIONAL BANK, which contained bank statements and checks from 1984 through the present.

2. [redacted] joint bank account held at COMMUNITY BANK, Omaha, Nebraska for the Senate of Lakes and Prairie.

PEAT, MARWICK accountants reviewed records regarding [redacted] as the following:

1. [redacted] account opened May 13, 1987 through December, 1989.

2. The [redacted] account opened July, 1983 through December, 1988, and the COMMUNITY BANK account, 511-013 a checking account opened in 1980, statements and FRANKLIN COMMUNITY FEDERAL CREDIT UNION (FCFCU) checks from 1980 through November 21, 1988.

PEAT, MARWICK reviewed records regarding [redacted] which would reflect her checking account at COMMUNITY BANK:

1. Checking account, COMMUNITY BANK, account number 514-896 to include all checks and deposits from January and February, 1986.

2. FCFCU share account 3858 from July, 1982 through September, 1988.

Investigation on 2/8/90 at Omaha, Nebraska File # Omaha 147A-571-663

by SA [redacted] Date dictated 2/8/90

This document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaned to your agency; it and its contents are not to be distributed outside your agency.

3.Any checks which [redacted] was involved in the FCFCU kites.

Records regarding [redacted] being held at the Financial Advisory Group's location would not have been reviewed by PEAT, MARWICK accounting firm or the attorneys representing [redacted]

Records being maintained at the Financial Advisory Group's office regarding [redacted] would not have been reviewed by PEAT, MARWICK accounting firm or the attorneys representing [redacted]

The following is a list of records being maintained by the NATIONAL CREDIT UNION ADMINISTRATION (NCUA) and being reviewed by the Financial Advisory Group on behalf of the NCUA and the United States Attorney's Office.

Records pertaining to [redacted] are:

1. Joint account of [redacted], FIRST NATIONAL BANK Mastercard account.

2. The [redacted] account at FIRST NATIONAL BANK from 1984 to the present, including bank statements and checks.

3. [redacted] and [redacted] joint account for American Express Centurion account.

4. [redacted] Visa account at BANK ONE, Columbus, Ohio.

5. [redacted] Diner's Club statements from 1983 through 1988.

6. [redacted] DOUGLAS COUNTY BANK account opened February 7, 1989.

7. [redacted] FIRST NATIONAL BANK Mastercard statements.

8. [redacted] auto loan.

9. [redacted] Bank America Visa gold card.

10. [redacted] FIRST NATIONAL BANK Visa.

11. [redacted] loan COMMUNITY BANK, December, 1988, Deed of Trust mortgage.

12. [redacted] COMMUNITY BANK, Senates of Lakes and Prairie.

13. [redacted] Citibank account.

14. [redacted], FIRST FEDERAL SAVINGS, Lincoln, Nebraska.

15. [redacted] Mastercard, FIRST NATIONAL BANK.

16. [redacted] Visa, Citibank.

17. [redacted], MERCHANTILE BANK, St. Louis, Visa account.

18. [redacted], NORWEST BANK car loan.

19. The FCFCU share account number [redacted]

20. Loans of FCFCU regarding [redacted]

Records being maintained by the Financial Advisory Group for the NCUA regarding [redacted] are:

1. COMMUNITY BANK checking account to include statements and FCFCU checks, number 511-013 opened 1983 through November 21, 1988.

2. A WADDELL and REED Brokerage from January 1, 1975 through December 31, 1988.

3. The FCFCU share account 1033 and loan account 1033 regarding [redacted]

4. The [redacted] Brokerage account regarding [redacted] opened May 13, 1987 through December, 1989.

5. The [redacted] Brokerage account, a personal account for [redacted] opened July, 1983 through December, 1988.

6. A joint account with [redacted] at the FIRST NATIONAL BANK OF OMAHA, July 1981 through the present a Mastercard account.

7. A NORWEST account with [redacted], and [redacted] regarding automobile loan.

Records being held by the Financial Advisory Group on behalf of the NCUA regarding [redacted] are as follows:

1. The personal checking account at NORWEST BANK, 1989 records regarding [redacted]

2. The OCCIDENTAL NEBRASKA auto loan, 1987 from TEAM 1 FORD on behalf of [redacted]

3. FCFCU loan file of [redacted] numbered 2400, June 16, 1982.

The following records being held by the Financial Advisory Group on behalf of the NCUA in regards to [redacted] are as follows:

1. The COMMUNITY BANK checking account number 514-896, checks and deposits from January and February of 1986, and the FCFCU share account number 3858, July, 1982, through September, 1988.

The following records being held by the Financial Advisory Group on behalf of the NCUA relating to [redacted] are as follows:

1. The FCFCU share account number 6299 and 6996.

All other records requested by [redacted] representing [redacted], are negative.

FILED
DISTRICT OF NEBRASKA
AT _____ M
FEB 2 1990
Norbert H. Ebel, Clerk
By _____ Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA, Plaintiff(s), vs. LAWRENCE E. KING, JR., ALICE PLOCHE KING, Defendant(s).	)	CR89-0-63 **MEMORANDUM AND ORDER**

Mrs. King has filed a motion (filing 130) seeking to obtain from the government some 21 hours of video taped statements of three individuals. The video taped statements were taken by investigators for a special committee of the Nebraska Legislature. The video taped statements were turned over to the Federal Bureau of Investigation. I now deny the motion.

Although Mrs. King's motion may be construed to be made upon Federal Rule of Criminal Procedure 16 grounds, at oral argument in this matter counsel indicated that the motion was predicated solely upon **Brady v. Maryland**, 373 U.S. 83, 87 (1963). According to **Brady**, the prosecutor has a duty to disclose, at least upon request, all evidence favorable to the defendant which is "material either to guilt or punishment." **Id.** at 87. With, or without, a specific defense request, evidence must be produced "only if evidence is material in the sense that its suppression undermines confidence in the outcome of the trial." **United States v. Bagley**, 473 U.S. 667, 678 (1985). Evidence generally considered to be **Brady** material includes: a witness' prior criminal record; a witness' statements favorable to the defendant; the existence of

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witnesses favorable to the defendant; psychiatric reports showing the defendant's legal insanity; specific evidence which detracts from the credibility or probative value of testimony or evidence used by the prosecution; promises of immunity to a government witness; and prior contrary statements of a prosecution witness. **Defending A Federal Criminal Case**, § 3.09 at 3-11 (1989, Federal Defenders of San Diego, Inc.). With these principals in mind, I turn to Mrs. King's motion.

I have not reviewed the actual video tapes. The parties agreed that such review was unnecessary because the prosecution agreed to submit to me, for **in camera ex parte** examination, a 45 page summary of the video tapes prepared by the Federal Bureau of Investigation. I further permitted Mrs. King's counsel to submit to me for **in camera ex parte** examination a specific explanation of the defense theory upon which the **Brady** motion was predicated. I have carefully reviewed the transcript and defense counsel's submission.

Put simply, the pending case is based upon an indictment alleging economic crimes, essentially arising out of alleged misappropriations of money from the Franklin Community Credit Union. The State Legislative Committee which took the statements, appears, from the context of the statements, to be interested in matters not directly related to the allegations of the indictment presently pending in this court against Mrs. King. I understand from the government that it received the video tapes long after the present indictment had been handed up by the federal grand

jury. The government advises me that the government is investigating the allegations which are contained in the video tape statements of the witnesses, but the investigation which is on-going is not directly related to the indictment in this court which charges Mrs. King. Specifically, the government tells me:

> The statements of the individuals in the videotapes relate to other allegations than those charged in the indictment against the defendant. An investigation of the allegations contained in the videotapes is ongoing by federal and state law enforcement authorities. The government has a legitimate interest in protecting against a premature release of material relating to an ongoing sensitive investigation of crimes unrelated to the charged indictment....
>
> ....
>
> The information sought by Defendant Alice King is not exculpatory to the charges in the indictment. The information does not directly relate to the expenditure of funds of Franklin Community Federal Credit Union (FCFCU) and the embezzlement of the FCFCU funds.... Defendant merely speculates that the information on the videotapes may show a lack of knowledge in the alleged conspiracy as charged in the indictment. This speculation is not warranted by the context of the video tapes and defendant articulates no further specific basis that the information is material to the preparation of her defense to the indictment.

Memorandum in Opposition to Defendant Alice King's Motion for Inspection, at 3-4.

My review of the transcripts and defense counsel's submission convinces me that the above quoted statement in the government's brief is true. Due to the sensitivity of the matter,[1] I shall not

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[1] Counsel for the government and counsel for Mrs. King are to be complimented for their professional handling of this issue, unlike others who are not presently before the court. As counsel alluded to during oral argument, these tapes have been the subject of wild public speculation. It is shameful and unethical to play games with the information contained in the tapes, such as, by

further elaborate.

IT IS ORDERED:

1. The motion (filing 130) is denied;

2. Herewith delivered to the Clerk of the United States District Court for the District of Nebraska is government's Exh. 1, the transcripts, and defense counsel's submission to the undersigned, both of which shall be sealed and not made available to any person or entity until further order of this court.

DATED this 2nd day of February, 1990.

BY THE COURT:

Richard G. Kopf
United States Magistrate

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leaking to the public supposedly accurate bits and pieces of information said to be contained in the tapes. The witnesses who gave the statements, the persons who may be accused in the statements, and the public deserve a calm, dispassionate, and private examination of the facts by competent public investigators and by competent public prosecutors before someone is accused, let alone tried. There is every reason to trust the integrity and competence of law enforcement, including the Federal Bureau of Investigation, the United States Attorney's Office for the District of Nebraska, the Nebraska State Patrol, and the Nebraska Attorney General's Office. Likewise, there is every reason to trust the competence and integrity of defense counsel. In contrast, there is no reason to trust those who frustrate the legal process by making outrageous, unsupported, and insupportable claims to the public before the legal process has had a chance to work. Those who care about justice would be well advised to follow the lead of counsel for the government and counsel for the defendant in this case by allowing the deliberative legal process to work free of sensationalized rumor and innuendo.